89-1693

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

John E. Norton,
Petitioner

v.

Paul C. Nicholson, Frank G. Benak,
Lois J. Fleming, and The
Village of Western Springs,
Respondents

Petition For a Writ of Certiorari
to the Illinois Appellate Court

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QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for consideration by this Court, with the assumption that the statement of each of the questions below are deemed to comprise and raise every subsidiary question and subargument fairly included therein, pursuant to S.Ct. Rule 14.1(a):

1) Whether a fire fighter's private memoranda to his superior officers—at their request—which critically address changes in fire apparatus response to emergencies in the community, squarely constitute speech on an issue of public concern pursuant to the content, form, and context considerations of the "*Connick* Test", and thus appropriately characterized as protected First Amendment speech.

2) Whether a governmental agency's written conclusionary findings, which stipulate specific memoranda as grounds for disciplinary actions against fire fighter, preclude a State Appellate Court—without a factual record established in the trial court or affidavits filed—from justifying agency's discipline on *post hoc* alternative grounds not contained in agency's findings or pleadings, pursuant to the factual "but for" criteria of the "*Mt. Healthy* Test."

3) Whether the "burden of proof" requirements of the "*Pickering* Balancing Test" require a "forum for the facts" via due process hearing by governmental agency and factual record supplied to trial court, in order for governmental agency to demonstrate that its interest in efficient operations outweighs employee's free speech rights.

4) Whether State court system's failure to provide adequate remedy for alleged deprivation of citizen's Federal Constitutional rights gives access to Federal court system under 42 U.S.C. § 1983.

THE PARTIES

The parties to the proceedings below are the petitioner John E. Norton and the following respondents: Western Springs Village Manager Paul C. Nicholson, Western Springs Fire Chief Frank G. Benak, Western Springs Personnel Officer Lois J. Fleming, and the Municipal Corporation of Western Springs.

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INTRODUCTORY PRAYER

The petitioner John E. Norton respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, 1st District, entered on August 31, 1989, which held that:

a) public employee's private memoranda to superiors on fire apparatus response policy only concerned internal operations and thus did not address matter of public concern.

b) governmental agency's disciplinary suspension and termination of employee, from fire department for the aforementioned memoranda,without an appeal hearing was reasonable and did not constitute violation of employee's free speech or due process rights.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, which appears in the appendix hereto, p. 1a *infra,* is reported at 187 Ill. App. 3d 1046 and 543 N.E.2d 1053.

The opinions of the Circuit Court of Cook County, Illinois, dated August 28, 1986 and April 9, 1987 are not reported. The portions of the official transcript containing the oral rulings from the bench and the subsequently entered written orders for hearings of August 28, 1986 and April 9, 1987 are reprinted in the appendix hereto, pp. 18a and 24a respectively *infra.*

The administrative findings and disciplinary action of the Village Manager for the Village of Western Springs, dated August 16-17, 1984 and February 6, 1985 are likewise not reported. They are reprinted in the appendix hereto, pp. 28a and 33a respectively *infra.*

JURISDICTION

The judgment of the Appellate Court of Illinois, 1st District, was entered on August 30, 1989. A timely petetion for rehearing was denied on October 27, 1989. A timely petition for appeal was filed with the Supreme Court of Illinois on November 1, 1989 and was denied on January 31, 1990. Petitons for rehearing are not allowed by the Illinois Supreme Court, but it did recall its Mandate to the Illinois Appellate Court on March 7, 1990, pending review by this Court. This petition for certiorari was filed within 90 days of January 31, 1990, the date the Illinois Supreme Court issued its denial of appeal.

Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257(3), pursuant to 1989 Supreme Court Rules 10.1(b) and 10.1(c).

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, United States Constitution:

Congress shall make no law * * * abridging the freedom of speech * * * ; or to petition the government for a redress of grievances.

Fifth Amendment, United States Constitution:

No person shall be * * * deprived of * * * liberty, * * * without the due process of law.

Fourteenth Amendment, United States Constitution:

* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of * * * liberty * * * , without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act of 1871, 42 U.S.C. §1983 (1976):

Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.* * *

HOW THE FEDERAL QUESTIONS WERE RAISED

The claim of violation of free speech rights and deprivation of due process were raised with the administrative agency of Western Springs and with the pleadings to the Circuit Court of Cook County, Illinois. The petitioner's Third Amended Complaint to that Court articulated those federal claims clearly, These same claims were restated in petitioner's proposed Fourth Amended Complaint, only under alternative remedy of 28 U.S.C. §1983. (see attached reprinting of those complaints in the appendix hereto, at p.45a and p. 63a respectively, *infra*)

The Appellate Court of Illinois specifically acknowledged the petitioner's federal claim in his Third Amended Complaint, in its ruling in this case (187 Ill.App.3d 1046, at 1049, 543 N.E.2d 1053, at 1054 reprinted in the appendix hereto, p. 4a *infra*), stating that:

> [i]n his third amended complaint, consisting of eight counts and three volumes of attached exhibits, plaintiff sought the issuance of a writ of *certiori* for judicial review of a decision of an administrative agency, *mandamus*, injunctive relief, and damages pursuant to 42 U.S.C §1983 (1976).

The Appellate Court further added (187 Ill.App.3d 1046, at 1049, at 1060, 543 N.E.2d 1053, at 1060 (p. 15a of appendix

attached hereto, *infra*), that

> the 'gist of John Norton's claim against the Village is whether the Village' deprived him 'of his constitutional rights to free speech and due process.' * * * plaintiff's claims against the other defendants are likewise founded on whether the Village deprived him of his constitutional rights to free speech and due process....

Likewise the respondents themselves have acknowledged, on page 4 of their answer to petitioner's appeal to the Illinois Supreme Court, that "the constitutional questions presented in this case arose in the trial court and not in and as a result of the action of the Appellate Court."

STATEMENT OF THE CASE

The petitioner, John E. Norton, is normally employed as a full-time college professor. However, as civic and community service to the Village of Western Springs, Illinois—of which he has been a longtime resident, owner, and taxpayer—he served as a part-time ("paid-on-call") fire fighter and emergency medical technician on the local fire department. His 10-year tenure on the department is well documented with dedicated service to the department and to the community. The petitioner had been consistently encouraged by Fire Chief Frank Benak to provide continual critical input into departmental policies and procedures, and was likewise often praised and thanked by Chief Benak for that input throughout 1982, 1983, and the first half of 1984. Fire Chief Benak himself has made written statements commending petitioner's "significant service to the community of Western Springs" **[R.C. 418]** and his "countless number of dedicated hours," wishing that he "remain a vibrant force within the department" **[R.C. 419]**.

The petitioner, as a citizen and taxpayer of the Village of Western Springs, in two separate instances (approximately six months apart) wrote private memoranda to his superiors criti-

cally commenting on changes in policy regarding fire apparatus response to fire emergencies in the community. These private memoranda were addressed and hand delivered to the appropriate superior officers of the department, as specified in the Village's Personnel Manual and in the Fire Department's Rules and Regulations for "grievance and complaint" or to "discuss or question" policies. Additionally in each instance, the petitioner had previously discussed the policy changes with these superiors and had received both their advice and their prior permission to further communicate his concerns to them in memo form.

Nonetheless, despite conformance with written Village procedures and receiving specific prior approval for writing both memoranda on fire department's fire apparatus response policy, the petitioner was still disciplined with 30-day suspension and termination respectively from employment on the fire department. The specific rationale given for the suspension and termination was that the two memoranda were antagonistic toward the petitioner's superior officers. The relevant facts and circumstances that led to this set of disciplinary actions by the respondents may be accurately and fairly summarized as follows:[1]

The Village of Western Springs had purchased—on the fire department's recommendations—a very expensive, technically sophisticated piece of fire apparatus. The rationale for this expenditure was publicly promoted by the fire department' administration to the Village Manager and the members of the Village Board as necessary to remediate problems with older fire apparatus and procedures in the fire department. The manner in which the fire department wished the apparatus to be configured and equipped was based on the role in which the apparatus was to be utilized; touted to Village officials and the community as an "attack pumper."

This rationale for specification and purchase was clearly arti-

[1]The text of certain appropriate documents is included within this statement of the case, rather than force this Court to seek them in the Appendix. In order to assist this Court in discerning the document text from the statement of the facts, the type face styles are varied accordingly.

culated and described in detail in a 1981 public document submitted by the Western Springs Fire Department entitled, General Description and Rationale for W.S.F.D. Maxi-Pumper Purchase

[R.C. 226-236], which stated ***inter alia:***

> *We are keenly aware of what the trends and directions in fire fighting procedures, technology, equipment and apparatus are and will be.... [T]hat trend is:*
>
> *__ To deliver more 'aggressive' and 'powerful' initial attacks on structure fires (also vehicle fires) with higher flow rates (GPM) and larger yet lighter attack lines.*
>
> *__ This trend has produced impressive fire supression in seconds rather than minutes or hours w/ less water damage–and all with less manpower.*
>
> *__This trend requires,...greater pumping capacity, increased capacity size of preconnected hose lines,... larger water tanks,...more coordinated and standardized fire attack.*
>
> *...We are confident of the direction that we need to go with in apparatus design, equipment, training, and operations. We are developing agressive, up-to-date and even progressive attitudes and therefore need agressive, up-to-date and even progressive 'tools' to do the job.*
>
> *...Specifically, the specifications and design for the new pumper along with the resultant changes in W.S.F.D. standard operating procedures will provide the following benefits:*
>
> *__ Rapid 'knockdown' (almost instantaneous for small and moderate size fires) of fires in structures or in vehicles with a so-called 'Blitz Attack' that is on a large enough scale rather than building up to needed heavy flows....* **[at R.C. 227-228]**
>
> *...In general, the new unit shall be designed and function as a versatile 'Attack Pumper' capable of independent hard-hitting initial fire suppression.*

...Since the 'attack pumper' is to be in front of the fire scene...all attack lines are preconnected....

150 ft. of 1 1/4" booster hose on a reel in rear compartment..., capable of delivering adequate GPM flow (100+ GPM) for vehicle fires with instant water available....

A preconnected Stang Deluge set...provid[ing] instant heavy stream' knockdown of well-involved structure fires or instantaneous exposure protection.

Shall have a 750 Gallon capacity water tank...giv[ing] a more adequate reserve for rapid, initial heavy GPM flow ...until hydrant water available to maintain water supply.

There will be a walk-through pump panel to allow the engineer a direct visualization of preconnected lines off... [and] allows better view of overall fire scene.

[at R.C. 230-231, emphasis added]

...An initial fire attack may use 1,000 G.P.M. for 30 seconds to knock down a large volume of fire and therefore [actually] use only 500 gallons of water, but the pumper has to have the capacity to provide that high rate of flow.... A typical house in Western Springs, with from 11 to 30 feet of distance between it and its neighboring houses requires a fire flow of 1,000 GPM.... The ability of the first apparatus on the scene to provide that needed flow rate is therefore crucial.

...Fire technology journals, textbooks on fire suppression tactics, and our own experiences with burndowns and actual fires have repeatedly emphasized the need for a 'heavy' initial attack. This new pumper will be the first piece of apparatus on the scene and its ability to provide an adequate initial attack with high GPM flow and sufficient pressure.... **[at R.C. 233, emphasis added]**

The new apparatus was specified and purchased as planned, and when delivered was utilized successfully as promoted in its initial "attack pumper" response role to all vehicle and structure fires for a period of approximately two years. Then inexplicably in June of 1984, a change of policy was implemented by

Fire Chief Benak **[R.C. 379]** that replaced the initial response of this apparatus to all vehicle fires (for which it was especially designed and equipped) with an older, smaller and slower apparatus that had less on-board water, less hose capacity, a smaller pump, and no instantaneous water capability.

The petitioner, concerned about this change in apparatus response and its impact on the effectiveness of vehicle fire fighting capability of the department, attempted to discuss the policy change with Fire Chief Benak. When Chief Benak declined to discuss the issue, the petitioner consulted with one of his immediate superiors[2] who both advised and gave him permission to communicate his concerns in memo form to the four lieutenants of the department, who were likewise his immediate superiors. Pursuant to that advice and advance permission **[R.C. 384]**, one week later on July 2, 1984, the petitioner wrote and hand delivered the following private memorandum **[R.C. 385-386]** to his immediate superiors which articulated his concerns about the changes in apparatus response procedures to vehicle fires.

TO: 'The Chain of Command'
FROM: John Norton
RE: New Vehicle Fire S.O.P.

I'm sorry, but I can't help but commenting on the change of procedures for manning and response to vehicle fires per the 6/25/84 S.O.P. Revision memo we all received.

We seem to be taking a giant step backward. What possible advantage could there be with responding the Squad Truck first instead of Engine 437?

Consider that:

> *Engine 437 was designed with vehicle fires in mind. An 1 1/2" hard line that can flow water at 100+ GPM rate instantly while advancing towards the vehicle (safety factor) without having to pull all of the of the line and straighten the kinks out, first such as is the*

[2]This was in conformance with "grievance and complaint" procedures in the Village Personnel Manual **[R.C. 150]** and "chain of command" procedures in the Fire Department Rules and Regulations **[R.C. 157]**, reprinted on pp. 38a and 42a respectively of the appendix hereto, *infra*.

case with the squad's 150 ft. soft line. Engine 437 also has a 21/2" preconnect attack line that would be more appropriate for a truck fire (or don't trucks count as vehicles?).

The engineer on 437 has a 'birdseye view' of the fire and line advancement, whereas the engineer of 336 does not.

Engine 437 can provide immediate lighting of the scene with no startup of generator and no climbing to aim floodlights required, as compared to squad 336 which requires both. (Don't vehicle fires happen at night too?)

Engine 437 has a 750 gallon tank and an easy mechanism for laying adequate supply line while 336 has 250 gallons less and only a short 'pony' soft suction line (3"). (Don't vehicle fires also include propane trucks, gasoline tankers, tractor trailers w/ lots of merchandise?)

Also consider that:

There is sometimes much to accomplish immediately at a vehicle fire that can keep a four-person crew busy for the first few minutes, let alone a 2-person crew. (Even a 2-person crew would have more going for them with Engine 437 than with Squad 336)

Engine 437 is a better handling vehicle in all types of weather for a prompt, safe response in comparison to Squad 336.

The role and importance of company officer is denigrated with the response of two in-station personnel and scene control handled by a chief or assistant chief (shades of the 'old days' which our present top echelon used to complain about when they were company officers).

It seems as if the roles of the vehicles, equipment, personnel are all in reverse order. Chief officers become company officers, the squad truck becomes an attack pumper, the attack pumper provides truck company support, the squad crew becomes an engine company, and the

engine crew becomes a squad company.

It's interesting that we send 4-person crews to leaf and trash fires on the first responding apparatus, but only a 2-person crew to a vehicle fire on the initial responding apparatus.

The excuse that we don't have many vehicle fires or that they seldom are very large could also be applied to structure fires. Why don't we send squad 336 first with a 2-person crew? They could handle 90% of what they would encounter.

I tried to clarify some of this with the Fire Chief, but he 'made a face' and walked away from me without a word. I can only guess that he couldn't answer unless it went through the 'chain of command.'

For writing and distributing this memo, the petitioner was terminated from the department. Pursuant to the Village Personnel Manual, an "appeal hearing" of sorts was granted; however at which no testimony, no evidence and no facts were presented or adduced, and petitioner's accuser Fire Chief Benak was not present nor gave any written testimony. No answers were available at the hearing to the petitioner's queries as to the specific problematic language in the memorandum or its actual impact on the department's operations.[3] Similarly, no response could be given to the petitioner's repeated written requests for such specifics both before **[R.C. 393, 396, 397]** and after **[R.C. 401]** this appeal hearing. Nonetheless, the Village Manager produced a set of conclusionary findings justifying Fire Chief Benak's disciplinary action against the petitioner **[R.C. 409-411]**, which have been reprinted in the appendix hereto, p. 28a *infra*.

As a result of that appeal hearing, petitioner was reinstated on the department, but with a 30-day disciplinary suspension

[3] At the July, 1984 appeal hearing, the Village Manager repeatedly responded to each of petitioner's requests for specific problematic languange in the memo-randum or procedural improprieties in giving them to his superiors with, "I don't know, I'll have to [check] with Chief Benak about [that]...."

along with specific instructions in a written directive, not to discuss or question fire department policies with anyone but the Fire Chief and/or the Assistant Fire Chief [item #4 of **R.C. 412**, see p.32a of appendix *infra*]. Within 30 days, the petitioner filed suit in the Circuit Court of Cook County, Illinois, against these disciplinary actions as a violation of free speech and denial of due process.

Six months later, in late December 1984, while on leave from the department,[4] the petitioner was informed of a rumored proposed change in standard operating procedures in the fire department's apparatus response to structure fires, which would alternate, every other month, the initial "attack" response of the newly purchased pumper with an older apparatus that had less on-board water, less hose capacity, a smaller pump, and no instantaneous water capability. Concerned about the impact such changes would have on the fire protection level to the community as well as the overall impropriety of ignoring the publically acclaimed rationale for the purchase of the new apparatus **[R.C. 226-236]**, the petitioner sought advice and advanced permission from Assistant Chief Seivwright to communicate his concerns **[R.C. 427]**. This was done in conformance with the terms of item #4 of the August 17, 1984 administrative directive from Fire Chief Benak **[R.C. 412]**, reprinted at p. 32a of the appendix attached hereto, *infra*.

Pursuant to that advice and specific prior permission, one week later, on January 7, 1985, the petitioner wrote and hand delivered the following memo **[R.C. 428-430]** to Assistant Chief Seivwright at his residence (emphases in orginal):

> *TO: Ass't. Chief Seivwright*
> *FROM: John Norton*
> *RE: Proposed Change in S.O.P.*
>
> *Per Chief Benak's memo of August 17th, 1984 and until litigation returns F.D. communications back to the 'normal' chain of command procedures, I am addressing the*

[4] Petitioner was on six month leave from the department, being out of town much of the time working on his residency requirements for his Doctorate.

following concern to you and am requesting that you pass it on to Chief Benak.

It has recently come to my attention that a new S.O.P. may be forthcoming, which will alternate the 'attack' and 'supply' pumper roles between Engine 437 and Engine 440.

While serving as a member of the committee that formulated the specifications and procedures for Engine 437, I was given express directions by then Assistant Chief Benak and yourself, to write a justification/rationale for the specification and purchase of a custom,'state-of-the-art' attack pumper so as to counter the proposal for 'another Engine 440', as desired by former Fire Chief Goodwin and former Village President Jens. If you will recall, a 50 to 60 page report was prepared and submitted to provide exactly such a justification/rationale (and was wholeheartedly endorsed by yourself and Frank Benak), which documented the <u>definite need</u> for:

-- larger capacity single stage pump
-- larger capacity water tank
-- preconnected deluge
-- top-mounted pump panel
-- simpler, virtually 'fool proof' controls
-- numerous and varying size preconnected lines
-- wider jump seats
-- larger diameter booster line for car fires

All parties; Chief Goodwin, the Village Manager, the Village President, and the Village Trustees were convinced that these capabilities were worth the extra $20,000 or more cost because of the intended 'attack' role and function of this piece of apparatus and the needs of modern, innovative fire fighting tactics as expressed in the numerous journal articles submitted for documentation. I remember particularly how adamantly then Assistant Chief Benak insisted on a top-mount pump panel due to the visibility afforded the driver/operator while pumping in front of the scene (despite the great difficulty it caused in specifying and engineering appropriate crosslay hosebeds, ladder mounts, and deluge piping). I also recall the importance given to wide jump seats, so that personnel could

safely don SCBAs while enroute to the scene, as well as the concern for the extra 2.5 minutes of 'on-board' water supply gained via a 750 gallon capacity tank to provide a 'margin of error and safety' for the initial attack crew until hydrant water received. There was also a desire to have instantaneous water via a preconnected deluge that had proved so successful in comparison to the delay in waiting for connecting two lengths of hose to discharge ports as used to be the case with the old squad truck. I remember the great concern for numerous varying length and varying size preconnect attack lines that could be pulled from this 'attack pumper', as additionally needed, because of its strategic location at the fire scene.

I agreed with all of these features and capabilities and so did you and Frank Benak; or so you both told me. We convinced the whole department, the Village administration, and the Village trustees, 'to the tune of' an extra $20,000 for these features and capabilities in an 'attack' pumper. The 'literature' backed up the sound thinking of our design and so did the 'experts' you invited to testify. I thought that we were not only right, but sincere in our request and rationale for such an expensive, yet 'up-to-date' piece of apparatus, that was designed specifically as an 'attack' pumper, which we stated could not be provided by another Engine 440 type design. Just think of the money and headaches that could have been saved by simply specifying and purchasing a duplicate of Engine 440, which could have easily brought us tactically and operationally to the same capabilities of this proposed new S.O.P.

HOWEVER, I GUESS I WAS JUST TOTALLY 'SUCKERED' INTO AN INSINCERE PLOY AND BECAME A PARTY TO DECEITFUL COMMUNICATION.

One way to view the proposed S.O.P. change is:

EITHER--The original premise and design of Engine 437 as an attack' pumper was faulty and a mistake, at a cost of $20,000+

OR-----The proposed premise of Engine 437 and Engine 440 being equally exchangable in the roles of attack' and supply' pumpers must be faulty and a mistake.

THE RULES OF LOGIC don't allow you to have it both ways.

Another approach renders the following judgment:

EITHER--All three of us on the committee were really stupid, ill-advised, and naive;

OR-----We are guilty of willful deceit and connivance;

OR-----Someone has an extremely short memory.

If the goal of this proposed S.O.P. is to provide Engine 440 with more 'running' and 'operating' time (which is both a valid and laudable goal), may I propose a suggestion that will not conflict with or usurp the tactical goals achieved with Engine 437's greater capabilities? After all, WE ARE NOT JUST ROTATING GARBAGE TRUCKS, BUT INSTEAD ARE DEALING WITH HIGHLY 'SPECIALIZED' AND NON-EQUITABLE FIRE APPARATUS:

1) Send Engine 440 out on trash, garbage, railroad tie, and leaf fires; where it will definitely get to pump and its small diameter twin booster reels are actually an advantage. (The 24 hr. availability of personnel to move Engine 437 and the nonemergency nature of the call make this quite feasible.)

2) Send Engine 440 to all mutual aid requests for an Engine company; where it it will get longer runs and a good possibility of pumping duty. (The 24 hour availability of a paramedic--who can't respond anyway--to move Engine 437 out of the way, again makes this quite feasible.)

3) Implement a procedure, like a number of other fire departments do, that stipulates that all driver/operators of all engine companies shall engage their apparatus's pumps upon the arrival at all structural alarms. (Such a procedure provides for 'exercising' not only the pumps, but also the operators.)

MEANWHILE, I think it would worthwhile for all parties concerned, to look back into the files and REFRESH SOME MEMORIES as to why Engine 437 was specified and pur-

chased the way it was by reading a copy of:

GENERAL DESCRIPTION AND RATIONALE
W.S.F.D. MAXI-PUMPER PURCHASE
(UNABRIDGED VERSION)
Submitted: January 1981
W.S.F.D. Pumper Committee

The petitioner was immediately terminated from the department by Fire Chief Benak for writing the foregoing memorandum, despite the fact that specific prior permission had been given to him by the Assistant Chief of the department to raise those issues in memo form, in total conformance[5] with the procedural requirements of item #4 of administrative directive to "discuss or question" departmental policies **[R.C. 412]** The petitioner's request for an appeal hearing, pursuant to terms of local Village Personnel Manual, was refused by the Village Manager despite the fact that such refusal was contrary to nondiscretionary requirement to hold an appeal hearing.[6] The Village Manager's conclusionary findings were included with his refusal of the appeal hearing **[R.C. 440-441]**, reprinted in the appendix hereto, page 33a *infra*.

The petitioner subsequently filed amendments to his Complaint already on file in the Circuit Court of Cook County, Illinois to reflect the foregoing facts of additional deprivation of free speech and due process, and these facts were alleged in his Third Amended Complaint to that Court. The respondents have never disputed any of these facts and moved to dismiss the petitioner's complaint solely on the basis of alleged technical flaws in common law pleading. However, the Circuit Court dismissed the entire cause of action based on its own misapprehension of the mootness of the facts alleged, without commenting on any of the Constitutional issues raised nor allowing the establish-

[5] Chief Seivwright advised petitioner that critical input from anyone on the department was welcome, since no policy decision had yet been made.

[6] According to Chapter XI, Section 11-2-2 of the Village Personnel Manual **[R.C. 150]**, "on request of the employee the Village Manager shall conduct a hearing into all circumstances surrounding the complaint or appeal...," reprinteted on pp. 39a of the appendix hereto, *infra*.

ment of any factual record.[7] In his motion to vacate the dismissal of his cause of action, the petitioner replead the exact same facts in a proposed Fourth Amended Complaint under the Federal remedy of 42 U.S.C. §1983, but the Circuit Court denied the request to amend along with its refusal to vacate the dismissal.

On the petitioner's appeal, as to the sufficiency of the pleadings, the Illinois Appellate Court was totally silent regarding the Circuit Court's misapprehensions of the facts. However, instead of remanding the case back to the trial court for fact finding or allowing the filing of the petitioner's proposed Fourth Amended Complaint, the Appellate Court proceeded to conduct its own *certiorari* review of petitioner's disciplinary suspension and termination.

Without the benefit of any factual record and solely on the basis of the pleadings, the Appellate Court held that the respondents had not violated petitioner's free speech rights nor deprived him of due process. The Appellate Court (187 Ill. App.3d 1046, at 1061; 543 N.E.2d 1053, at 1061) characterized both of the petitioner's private memos to his superiors as "merely employee grievances concerning internal operations" rather than addressing issues of public concern, citing *Connick v. Meyers*, 461 U.S. 138, at 154; 103 S.Ct. 1684, at 1694.

Additionally, the Appellate Court inferred, on its own volition, that petitioner had been a burdensome and troublesome employee prior to the two memoranda in question, (at 1060-1061, reprinted on pp.15a-16a of the appendix hereto, *infra*)—this despite the fact that the respondents had never contended any such history or problem (not even in their pleadings), and in fact had commended petitioner's "significant service to the community" **[R.C. 418]**, "countless number of dedicated hours" and being "a vibrant force within the department" **[R.C. 419]** during the two years preceding the two memoranda.

The Court held that the respondents, as governmental agents

[7]The Circuit Court issued an order granting respondent's motion to stay the petitioner's "Request for Admissions of Fact" [R.C. 462].

responsible for efficiency of services, don't have to tolerate employee complaints over internal office affairs (citing *Connick v. Meyers* [1982], 461 U.S. 138, at 149, 103 S.Ct. 1684, at 1691), and thus could have wide discretion in disciplining employee who it feared would impair efficiency of its operations (citing Justice Powell's separate opinion in *Arnett v. Kennedy* [1974], 416 U.S. 134, at 168, 94 S.Ct. 1633, at 1651). The Appellate Court also held that the respondents had no obligation to provide an appeal hearing following their dismissal of the petitioner for his memoranda.

The Appellate Court was petitioned for a rehearing on the basis of its misapprehension of fact and law. The Appellate Court denied the petition.

The petitioner appealed the Appellate Court's ruling to the Illinois Supreme Court on the basis that it was contrary to the U.S. Supreme Court holdings in *Connick v. Meyers* (1983), 461 U.S. 138, 103 S.Ct. 1684, *Givhan v. Western Line Consolidated Sch. Distr.* (1979), 439 U.S. 410, 99 S.Ct. 693, *Mt. Healthy City Board of Educ. v. Doyle* (1977), 429 U.S. 274, 97 S.Ct. 568, and *Pickering v. Board of Education* (1968), 391 U.S. 563, 88 S.Ct. 1731, as well as *Cleveland Board of Educ. v. Loudermill* (1985), 470 U.S. 532, 105 S.Ct. 1487. The Illinois Supreme Court denied the petitioner's appeal of the Appellate Court ruling without comment.

REASONS FOR GRANTING THE WRIT

(Argument)

As Justice Powell stated in his concurring argument in a similar public employee free speech case, *Rankin v. McPherson* (483 U.S. 378, 107 S.Ct. 2891, at 2900-2901),

> [i]t is not easy to understand how this case has assumed constitutional dimensions and reached the Supreme Court of the United States. The fact that the case is here, however, illustrates the uniqueness of our Constitution and our system of judicial review: courts at all levels are available

and receptive to claims of injustice, large and small, by any and every citizen of this country.

Unfortunately the case at bar arrives before this High Court for inverse reasons, namely the lack of availability and receptivity of a state court system to their proper role in protecting the most important right granted to U.S. citizens by the U.S. Constitution, that of free speech.[8]

The issue before this Court is a substantial one. This Court was emphatic in *Connick v. Meyers* (461 U.S. 138, 103 S.Ct. 1684, at 1689) "that speech on public issues occupies the 'highest rung of First Amendment values' and is entitled to special protection." However, without consistent application of the standards of review for free speech established by this Court, this holding on First Amendment values is reduced to mere tautology and its "entitle[ment] to special protection" becomes illusory. While the right of free speech of public employees is not absolute, before such an important liberty as free speech can be taken away by a governmental agency, certain due process safeguards are mandatory and proper judicial review is the only means to assure such due process.

The eventual outcome to the petitioner is not what should concern this Court, but rather the misinterpretations by lower courts and governmental agencies of this Court's holdings, cautions, and admonitions on the rights of free speech for public employees. It is primarily at the state and local level that violations of such rights are most likely to occur, and the only enforcement of constitutional protection against such infringements comes from the judiciary (Spurrier, *To Preserve These Rights: Remedies for the Victims of Constitutional Deprivations*, [1977] at 7-9). Therefore the U.S. Supreme Court needs to grant certiorari in such cases in order to continue to stress and clarify the consistent standards to be utilized by all courts, State

[8] This Court has once before confronted the inability of the State Courts of Illinois to protect the safeguards of free speech of public employees in *Pickering v. Board of Education* (1968), 391 U.S. 563, 88 S.Ct. 1731), and that case became the landmark decision for all such cases

and Federal, in judicial review of public employee free speech cases (*Nonpartisan Speech in the Police Department: The Aftermath of Pickering*, 7 Hastings Const. L.Q. 1001, at 1029).

The petitioner is not at all interested in the damages in this case.[9] Nor is he interested in the employment position *per se*, which was for the sole purpose of providing civic service to his community.[10] Rather, the petitioner is earnestly concerned that public employees cannot communicate to their employers their conscience about policies and improprieties that significantly impact public safety, such as fire protection. It is even more troubling when local officials to actually encourage and invite such employee criticism on a specific issue and then discipline that speech because they did not like the content or tone of that criticism. As a taxpayer and homeowner, the petitioner would hope that the public employees in his community (particularly those whose livelihoods depend upon their public employee role) would be able to raise privately with their own superiors, issues of potential public policy error and/or of possible impropriety in governmental decisions and not fear retaliatory discipline. "When a [public] employee challenges an allegedly impermissible dismissal, he protects not only his own rights but the rights of other employees as well," and likewise when such an employee loses that challenge, there is a chilling effect on the exercise of those rights by others (*Free Speech and Impermissible Motive in the Dismissal of Public Employees*, 89 Yale L.J. 376, 392).

The Illinois Appellate Court, as a state court of last resort in the case at bar, has decided this important Federal question in a manner that conflicts with applicable decisions of this Supreme Court, as well as with those of Federal appellate jurisdiction. This State Appellate ruling represents the first time the "*Conn-*

[9]The petitioner has repeatedly stipulated to the respondants that he would forego all damages in this litigation.

[10]When considering expenses and overtime salary potential sacrificed from his full-time teaching position, the position actually caused him a net loss in pay.

ick Test" has been applied in Illinois and its holdings signal a potential dramatic shift in the handling of the judicial review of disciplinary actions against public employee speech activity in the State Court system.

The potential significance of the Appellate Court's ruling in this case was not lost to the legal community in Illinois, as evidenced in the recent legal advice and analysis for the Illinois Fire Chiefs, by Attorney Bruce Holmgren, as legal advice in their Association's Magazine, The Gong (Winter Issue, Jan. 1990, pp.32-33), in which the author states *inter alia*:

> The recent case of *Norton v. Nicholson* (citations omitted) gives us some usable answers [which] offer comfort to any chief facing the question of just how much criticism he and his department must take.* * *In the bluntest possible language, these [cited U.S. Supreme Court] cases show that you do not have to take the sort of disruptive guff that this Western Springs case shows was taking place, and you don't have to stand for it very long.

This significant shift has been given additional credence by the Illinois State Supreme Court's denial of the petitioner's appeal of the decision to that Court (In Illinois, denial of leave to appeal constitutes an approval of the decision, pursuant to *Arndt v. Resurrection Hosp.*, 163 Ill.App.3d 209, 517 N.E.2d 1). Likewise, a U.S. Supreme Court denial of certiorari here would automatically add the final "stamp of approval" to the Appellate decision/holdings in any Shepardized citation invoked for precedent in Illinois. Thus the Illinois Appellate Court's holdings in the case at bar would become pursuasive Illinois case law precedent for the applications of the "*Connick* Test" for future free speech litigation in the State.

As this Court is no doubt aware, such public employee free speech cases continue to be problematic in the Federal and State Court systems throughout the country. This is an area of law that still very much needs the continuing authority and guidance of the U.S. Supreme Court, for despite this Court's rulings in *Pickering (supra), Mt. Healthy (supra), and Connick(supra),*

there is still a fair amount of misunderstanding in this area of the law in the lower courts (*Ferrara v. Mills*,781 F.2d 1508, at 1512-1513, 11th Cir. 1986). For that reason alone, this Court should grant *certiorari* in this case in order to further reiterate, clarify, and reinforce the same succinct step-by-step outline the *Ferrara* court provided (at 1512-1513) of the analytic framework necessary for a judicial review of First Amendment claims of public employees.

The *Ferrara* court clearly laid out the three specific separate and progressive steps required in all such cases, to which the U.S. Supreme Court can lend its authority;

1) The first step requires analysis as to whether the employee's speech addresses an issue of public concern and is thus constitutionally protected, termed the "*Connick* Test."

2) If protected, then it must be determined as to whether the speech was the substantial or prime motivating factor in the employee's discipline, termed the "*Mt. Healthy* Test"

3) Finally, the question before the court becomes that of whether the governmental employer's interest in providing efficient public services outweighs the employee's interest in protected speech, the so-called "*Pickering* Balance."

As will be demonstrated, the Illinois Appellate Court's holdings in the case at bar conflict with the accepted standards of all three of these steps (evidenced by Federal Appeals Court and U.S. Supreme Court decisions). Thus these three steps form the basis of the questions presented for review by this Court.

1) The first question presented for review is whether a fire fighter's private memoranda to his superior officers—at their request—which critically address change in fire apparatus response to emergencies in the community, squarely constitute speech on an issue of public concern pursuant to the content, form, and context considerations of the "*Connick* Test", and thus appropriately characterized as protected First Amendment speech.

Whether a public employee's speech is constitutionally protected turns upon whether the speech related to matters of public concern rather than to matters of merely personal interest to the employee; that is whether it can "be fairly considered as relating to any matter of political, social, or other concern to the community." (*Connick v. Meyers*,461 U.S. 138, 103 S.Ct. 1684, at 1690) This Court also held in *Connick* that the initial threshold inquiry into the constitutionally protected status of the employee's expression is a question of law, not of fact, and is to be determined by an examination of the content, form, and context of the speech "as revealed by the whole record" (also at 1690, emphasis added), confirmed most recently in *Rankin v. McPherson* (483 U.S. 378, 107 S.Ct. 2891, at 2896-2897).[11]

It is important to note here (as made perfectly clear in *Johnson v. Lincoln Univ. of Com.*, 776 F.2d 443, 3rd Cir. 1985, at 451, emphases added), that the nature of the employee's statements as addressing issues of public concern is not lessened because "employee's statements are an outgrowth of a personal dispute" (citing *Connick v. Meyers*,103 S.Ct. 1684, at 1691), nor by "employee's arrangements to communicate privately with his employer rather than to spread his views before the public" (citing *Givhan v. Western Line Consol.School District*, 99 S.Ct. 693 at 697), nor by "the tone of the communication" (citing *Trotman v. Board of Trustees of Lincoln Univ.*, 721 F.2d 98, 3rd Cir. 1983, at 103). These factors are simply not relevant to the "*Connick* Test" and only become considerations in the last stage of analysis, that of the application of the "*Pickering* Balance"; for it is only the content, form, and context of the statements that determine the protected status of the speech (*Ferrara v. Mills*,781 F.2d 1508, 11th Cir. 1986, at 1512-1513).

[11]The Illinois Appellate Court characterized petitioner's two memos as not addressing issue of public concern on the basis of an examination of two brief sentences from each memo, while ignoring (without comment) the other appro ximately 500 words and 1,050 words of those respective communications.

And yet the Illinois Appellate Court cited those same factors as its rationale for characterizing petitioner's communications as not addressing matters of public concern. The foregoing conflict demonstrates that the Illinois Appellate Court miscomprehended the nature of the "*Connick* Test" by inappropriately including the "*Pickering* Balance" elements into its threshhold analysis.

In contrast to the Appellate Court's finding, an examination of the petitioner's memoranda of July 1984 and January of 1985 as to a) their content, b) their form, and c) their context. shows the following:

a). The Content of petitioner's Statements

The overriding substance of both of petitioner's memos most certainly deals with an issue of public concern, namely the response order of particular fire apparatus and their comparative capabilities in providing fire protection to the community, and whether the apparatus was being utilized for the express purpose which it was purchased. It is reasonable to assume that a fire department's apparatus response procedures are for the benefit of the community, and not for the benefit of the fire department or its personnel.

A case on point, is *Bickel v. Burkhart* (632 F.2d 1251, 5th Cir. 1980, at 1253), where a fire fighter's criticisms made to his fire chief—"we had two new engines at Central Station doing nothing, while you had a 1962 model at your station making more fire calls than any station in the city"—were held to be constitutionally protected. It has been similarly been ruled in the State Courts of Illinois that fire fighter's critical comments on his department's apparatus response procedures:

> ...certainly dealt with a matter of public concern [as they] involved the emergency procedures of the department which could readily reflect upon public safety. [The Court added that] 'public employees are particularly acquainted with issues of public importance..., [and accordingly it is essential that they are able to speak out on such questions without fear of retaliatory dismissal.' (*Griggs v. Bd. of Fire & Police Comm'rs. of North Maine Prot. Distr.*(102 Ill.App.3d 614, at 618, 430 N.E.2d 188, [1981], citing

Pickering v. Bd. of Education, 391 U.S. 563, 88 S.Ct. 1731).

Surely, the issues of apparatus response raised by the petitioner's memoranda, in the case at bar, are of equal public import to those raised in both *Bickel*.and *Griggs, supra*

Likewise the content of petitioner's memos certainly comes under the aegis of the following holding in *Conaway v. Smith* (853 F.2d 789, 10th Cir. 1988, at 797, numeration added); "speech that seeks to [1] expose improper operations of government or [2] questions the integrity of governmental officials clearly concerns vital public interests,...and the fact that [employee] chose a private forum, rather than public, does not remove it from First Amendment protection." Petitioner's memos, in the case at bar, definitely raise both of these issues with his superiors.

b). The Form of petitioner's Statements

As to the form of the petitioner's expressions; in both instances (July 1984 and January 1985), the petitioner was specifically advised, given prior permission, and even invited by his superiors to utilize a private memorandum form of communication to express his concerns about changes in fire apparatus response policy. Petitioner kept all communication private and limited addressing his concerns to whatever authorities within the department that respondents had stipulated as appropriate.

While private expressions may add the considerations of manner, time, and place of communication, the Illinois Appellate Court mistook those considerations as factors in the "*Connick* Test"—which is to determine solely whether statements address an issue of public concern. The manner, time, and place of the speech are only factors in the third stage of analysis; that of the "*Pickering* Balance" which is to be considered after the protected status of the speech is determined, and thus irrelevant to the "*Connick* Test" (*Ferrara v. Mills*, 781 F.2d 1508, 11th Cir. 1986, at 1513).[12]

Therefore, the fact that an employee's comments are made to superiors in private does not strip them of constitutional protection" (*Givhan v. Western Line Consol. School Distr.*, 439 U.S. 410, 99 S.Ct. 693, at 696-697), and this includes critical statements made in internal private memoranda (*Eichman v. Indiana State Univ. Board of Trustees* 597 F.2d 1104, 7th Cir. 1979, at 1105).

Likewise, simply "because speech may have had the effect of irritating or even harassing [agency] administration does not mean that such speech is stripped of its first amendment protection" (*Peacock v. Duval*,694 F.2d 644, 9th Cir. 1982, at 647). As this Supreme Court stated in *Pickering v. Board of Education*,(391 U.S. 563, 88 S.Ct. 1731, at 1735), "to the extent that the [government's] position here can be taken to suggest that even comments on matters of public concern,...may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it (emphasis added)."

Most recently, this Supreme Court reaffirmed such holdings when it stipulated in *Rankin v. McPherson* (483 U.S. 378, 107 S.Ct. 2891, at 2898):

> The inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern* * *'and may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' (citation omitted) 'Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected.' (citation omitted)

More importantly, as held in *Givhan v. Western Line Cons. School Distr.* (439 U.S. 410, 99 S.Ct. 693), when a supervisor "opens the door" to private communication from an employee, he is no longer in a position to argue that he was the "unwilling recipient" of the employee's views (at 696), even if

[12]Nonetheless, the manner, time, and place of petitioner's communication were dictated by the respondents and their agents, and adhered to by petitioner.

"hostile," "loud," and "arrogant" (at 695).

c). The Context of Petitioner's Statements

The final consideration under the "*Connick* Test" is that of the context in which employee's statements were made. In the case at bar, the circumstances surrounding petitioner's memos of July 1984 and January 1985 are made clear in the statement of the case in this petition.

The fire department's 1984 procedural changes in fire apparatus response to vehicle fires and structure fires clearly contravened its own 1981 publicly promoted rationale and role for the purchase of the fire apparatus in question (see pp. 5-7 of this petition). The petitioner's memoranda of July 1984 and January 1985 both address that contravention directly. In petitioner's view, that contravention would not only have a significant detrimental effect on departmental fire fighting efficiency, but also appeared to demonstrate a lack of sincerity, honesty, and integrity in the original rationale given for the apparatus purchase, and thus improper. Rather than spreading his views before the public to "blow the whistle" on the change in apparatus role, the petitioner chose to follow Village and departmental rules and regulations by adhering to "chain of command" procedures in privately communicating his concerns to his superiors in the department, with their prior permission. Such private attempts "to expose improper operations" and/or "question the integrity of officials" of the government are still correctly described as "whistleblowing" activity, thus receiving special First Amendment protection (*Conaway v. Smith*, 853 F.2d 789, 10th Cir. 1988, at 797, emphasis added).

[An employee] has a constitutional right, pursuant to the First and Fourteenth Amendments, to privately express his criticism of administrative policies to his superiors (*Derrickson v. Board of Educ. of City of St. Louis*, 703 F.2d 309, 8th Cir. 1983, at 316). The Court in *Swaaley v. United States* (376 F.2d 857, Ct. of Claims 1967), called such communication of accusations of wrongdoings "a petition for redress of grie-

vances" (at 861) and "it would seem that whatever right a [public] employee has under the First Amendment include petitions to the head of his own department" (at 862), and "a petition, properly so-called, that has never left a Department need do no harm" (at 863).

2) The second question presented to this Court for review is whether a governmental agency's written conclusionary findings, which stipulate specific memoranda as grounds for disciplinary actions against fire fighter, preclude a State Appellate Court—without a factual record established in the trial court or affidavits filed—from justifying agency's discipline on *post hoc* alternative grounds not contained in agency's findings or pleadings, pursuant to the factual "but for" criteria of the "*Mt. Healthy* Test.".

After the protected status of the speech has been ascertained, it must be determined whether that speech was the substantial motivating factor in employee's discipline—the "*Mt. Healthy* Test." In other words, "but for" the employee's statements, would the employer have followed the same disciplinary course of action. This is always a question of fact, not of law. (*Mt. Healthy City Board of Educ. v. Doyle*,429 U.S. 274, 97 S.Ct. 568, at 576)

Fortunately, the answer to this question is easily answered in the case at bar, since the respondents' position on this point has been unequivocal and consistent in <u>all</u> of their assertions and claims throughout the pleadings in this case. The respondents themselves have specifically identified the memo of July 2, 1984 [see **R.C. 388, R.C. 391, R.C. 397, R.C. 409-411**] and the memo of January 7, 1989 [see **R.C. 436, R.C. 440-441**] as the sole rationale for their disciplinary suspension and termination of petitioner respectively. There have been no other contentions or claims by respondents in their charges, findings, or pleadings. Thus the record in the present case obviates the need for this causation analysis.

Yet the Appellate Court made an incorrect and inappropriate

additional inference of fact (pp.15a-16a of the appendix hereto, *infra*), that petitioner was a "troublesome and burdensome employee" during the two years prior to the memoranda of July 1984 and January 1985. The respondents have never contended that the petitioner's conduct prior to the memo of July 2, 1984 was anything but satisfactory. The issue was never cited or raised in any of the charges or grounds or responses to petitioner's requests for specificity/clarification or administrative findings for disciplinary action against the petitioner, nor in any of their pleadings to either the Circuit Court or to the Appellate Court. In fact, the record contained Fire Chief Benak's written commendations of petitioner's "significant service to the community" **[R.C. 418]**, "countless number of dedicated hours" and being "a vibrant force within the department" **[R.C. 419]** during the two years preceeding the two memoranda.[13]

The respondents have made clear that their disciplinary actions against the petitioner were solely for the his memoranda of July 1984 and January 1985. The respondents themselves admit even further (on pages 15-16 of their pleadings to the Illinois Supreme Court), that petitioner's criticisms of policy were not the grounds for discipline, but rather the tone of the communications of July 1984 and January 1985.

The Court in *Tygrett v. Barry* (627 F.2d 1279, D.C. Cir.1980, at 1286) warns of the dangers involved when a court rummages around in the record to try and reconstruct a *post hoc* justification for disciplinary actions against employee speech, and labels such judicial review methods as impermissible and contrary to *Pickering*. As clearly laid down in *Pickering v. Bd. of Educ.* (391 U.S. 563, 88 S.Ct. 1731, at 1735-1737) and *Rankin v. McPherson* (483 U.S. 378, 107 S.Ct. 2891, at 2898-2899), the governmental agency has the burden of proof

[13] It was the petitioner who raised the issue (in his appeal hearing of July 26, 1984) regarding the prior history of Chief Benak encouraging his critical input and the overt receptivity to that input. The memo to the Village Manager **[R.C. 404-405]**, submitted at his request, simply cited an estimate of the number and type of criticisms welcomed and even requested by Fire Chief Benak in the pre-ceding two years.

for demonstrating their findings of fact.[14]

3) The third question presented to this Court for review is whether the "burden of proof" requirements of the "*Pickering* Balancing Test" require a "forum for the facts" via due process hearing by governmental agency and factual record supplied to trial court, in order for governmental agency to demonstrate that its interest in efficient operations outweighs employee's free speech rights.

The "*Pickering* Test" is solely a question of fact, supported by the evidence, and with the "burden of proof" shifted entirely to the governmental agency[15] to demonstrate that its interest outweighs that of the employee's protected speech, with all factors in the balancing test "applied with the deference to be accorded first amendment rights" (*Tygrett v. Barry,* 627 F.2d 1279, D.C. Cir. 1980, at 1283). Thus there must be a "full hearing of the facts" in order to determine the extent to which an employee's speech actually disrupted the governmental agency (*Porter v. Califano* 592 F.2d 770, 5th Cir. 1979, at 777, emphasis added) and "the test to be used is the same whether the speech at issue is public, as in a letter to a newspaper, or private, as in a report to an individual" (*Brockell v. Norton,* 688 F.2d 588, 8th Cir. 1982, at 593).

This "burden of proof" requires that the governmental agency must provide substantive evidence that the statements made by the employee: [a] actually impaired discipline by immediate superiors, [b] actually impaired harmony amongst coworkers, [c] actually had a detrimental impact on close working relation-

[14] Additionally, in Illinois common law procedure, it is inappropriate for a re-viewing court to draw inferences of fact or substitute its judgment for an ad-ministrative agency (per *Quinlan & Tyson, Inc. v. City of Evanston,* 25 Ill.App.3d 879, 324 N.E.2d 65, at 70).

[15] The employee has the burden of proof as to the "*Connick* Test" and the "*Mt. Healthy* Test," whereas the "*Pickering* Test" shifts the burden to the governmental employer (*Ferrara v. Mills,* 781 F.2d 1508, at 1512-1513, 11th Cir. 1986), and thus the "*Pickering* Test" cannot be done solely on basis of the averments of the pleadings.

ships in which personal loyalty and confidence are necessary, [d] actually impeded the performance of the employee's duties, [e] actually interfered with the regular operation of the enterprise[16] (pursuant to *Pickering v. Board of Education*,391 U.S. 563, 88 S.Ct. 1731, at 1735-1737; reaffirmed by *Rankin v. McPherson*,483 U.S. 378, 107 S.Ct. 2891, at 2899)

However, the only evidence submitted by the respondents in the case at bar is the two memos themselves and as held by *Jungels v. Pierce* (825 F.2d 1127, 7th Cir. 1987, at 1132, emphasis added); the submission of the employee's own communication as the sole evidence is insufficient to refute the First Amendment rights of that employee in the *Pickering* "test."

The administrative findings by the respondents **[R.C. 409-411]**,and **[R.C. 440-441]**, pp. 28a and 33a respectively, of the appendix hereto *infra*, can only be described as conclusionary. As held in *Monsanto v. Quinn* (674 F.2d 990, 3rd Cir.1980, at 999), where there are general conclusions of disruption, but no specific evidence or examples or particulars of actual material and substantial disruption or interference with the performance of duties caused by the communication(s), then the agency fails its burden of proof.

As stated in *Pred v. Bd. of Instr. of Dade County, Fla.* (415 F.2d 851, 5th Cir. 1969, at 851-852 and 859-860), in deciding free speech cases courts must ascertain on what the real facts are [through normal process of discovery], not what the advocates and the barebone pleadings say the facts are. The first step towards that full exploration of the real facts is a post-termination hearing necessary to fulfill due process deprivation of free speech liberty (*Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, at 2698). Likewise, it is a due process violation of the Fourteenth Amendment of the U.S. Constitution to deprive liberty of free speech via disciplinary termination without benefit of an appeal hearing (*Hostrop v. Board of Jr College Distr.* No. 515, 471 F.2d 488, 7th Cir.1972, at 494-495; and *Fleming v.*

[16]The evidence required for each of these factors, as distinguished by Federal Appeals Court decisions, will be examined in the brief on the merits, should this Court grant certiorari.

Kane County, 116 F.R.D. 567, N.D.Ill. 1987, at 571).

It is important to emphasize here that petitioner is not asking this Court for reinstatement, or damages, or even a review of disputed facts, all of which would be inappropriate given the nonexistent factual record in this case. Instead, the petitioner seeks this review to have this cause of action remanded for a long overdue post-termination hearing and trial court judicial review, both for the express purpose of establishing the "forum for the facts" yet to be provided in this case. More importantly, this Court's directions and opinions in this review will be instructive to the lower courts, governmental agencies, and public employees alike.

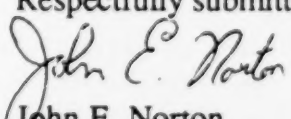
4) The fourth and last question presented to this Court for review is whether State court system's failure to provide adequate remedy for alleged deprivation of citizen's Federal Constitutional rights gives access to Federal court system under 42 U.S.C. § 1983.

This last question is <u>not</u> presented here as a reason for granting certiorari, but rather to preserve it for review as a question of potential remedy should this Court grant this petition.

CONCLUSION

For the reasons set forth above, this petition for certiorai should be granted to review the judgment and opinion of the Illinois Appellate Court

Respectfully submitted,



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April 27th, 1990

APPENDIX

To Petition For a Writ of Certiorari
to the Appellate Court of Illinois

[Copies below of the Illinois Appellate opinion and Judgment, reprint of Cook County Circuit Court bench rulings and entered orders, reprint of Village of Western Springs administrative findings, and reprint of pertinent sections of Village of Western Springs Personnel Manual and Fire Department Rules & Regulations]

JOHN E. NORTON, Plaintiff-Appellant, v. PAUL C. NICHOLSON *et al.*, Defendants-Appellees.

First District (3rd Division) No. 1—87—1477

Order affirmed.

Opinion filed August 30, 1989.—Rehearing denied September 27, 1989.

1. ADMINISTRATIVE LAW—*common law certiorari was proper method to review municipal agency decision beyond ambit of Administrative Review Law.* Where a municipal administrative decision was not within the ambit of the Administrative Review Law, it was reviewable by way of a common law *certiorari* requiring the court to determine from the record alone whether there was any evidence to support the administrative order, and not to set aside such order unless it was against the manifest weight of the evidence.

2. ADMINISTRATIVE LAW—*administrative fact findings are deemed prima facie true and correct and must be upheld unless against manifest weight of evidence.* On review of administrative agency decisions, fact findings and conclusions are deemed *prima facie* true and correct, and the re-

viewing court may not resolve conflicting evidence or reverse such findings unless they are against the manifest weight of the evidence.

3. POLICE AND FIREMEN—*administrative finding that fireman's memorandum violated village personnel and fire department rules was not against manifest weight of evidence.* An administrative order suspending a village fireman, based upon a finding that he circulated a critical memorandum undermining the authority of the village police chief in violation of village personnel and fire department rules, was not against the manifest weight of the evidence.

4. POLICE AND FIREMEN—*thirty-day suspension with admonition was not unreasonable discipline for violation of village fire department rules.* A 30-day suspension without pay, coupled with an admonition to modify behavior so as to avoid a possible future dismissal, came within the realm of reasonable discipline and was not arbitrary or improper in light of administrative findings that the plaintiff fireman circulated a disruptive memorandum in violation of village personnel and fire department rules.

5. POLICE AND FIREMEN—*challenge to fire chief's directive was moot where no action or inaction was attributable thereto during its existence.* The plaintiff fireman's challenge to his fire chief's written directive was moot where no disciplinary action was brought against the plaintiff during the 90 days in which the directive remained in force, and the plaintiff did not allege that he engaged in or refrained from any action or conduct covered by the directive during such period.

6. POLICE AND FIREMEN—*administrative fact findings warranting dismissal of village fireman were not against manifest weight of evidence.* Administrative fact findings that the plaintiff village fireman sent a memorandum which was antagonistic toward his superior officers and interfered with cooperation of department employees, and that the memorandum was violative of prior disciplinary proceedings in which plaintiff was admonished to refrain from such behavior under penalty of possible dismissal, were not against the manifest weight of the evidence and could justify the dismissal of the plaintiff as within the realm of proper disciplinary action based on the entire record.

7. MUNICIPAL CORPORATIONS—*first amendment does not preclude dismissal of employees whose conduct hinders efficient operation of municipality.* Although public employment cannot be conditioned on a basis that infringes on the employee's first amendment rights, the wide discretion and control of a municipality over the management of its personnel and internal affairs includes the prerogative to dismiss with dispatch employees whose conduct hinders the efficient operation of the municipality or its departments.

8. CONSTITUTIONAL LAW—*record established that fireman's conduct*

was undermining village's operation of its fire department and was not entitled to first amendment protections. The record disclosing the plaintiff's conduct in regard to the manner, time, and place thereof, including the context of his vocalized criticisms over a two-year period in witnessed confrontations with his chief, as well as the fact that the disputes touched on matters of personal rather than public concern, established the nature of the plaintiff's conduct as undermining the village's operation of its fire department so as to justify his dismissal from the department without violating his constitutional rights of free speech.

9. OFFICERS AND PUBLIC EMPLOYEES—*when employee's speech may threaten authority of municipality to conduct its operation.* Where a municipal employee's purported exercise of free speech relates to policy changes stemming from an employment dispute concerning the application of policy changes to such employee or to his past involvement in the creation of the subject policy, additional weight must be given to the fact that the employee has threatened the necessary authority of the municipality to run its operation as it deems best.

10. CONSTITUTIONAL LAW—*discharged fireman's complaints against village officers failed to state claim grounded on violation of first amendment rights.* A discharged fireman's complaints against village officers and fire chief failed to state a claim for violation of first amendment rights, where the statements resulting in his discharge were in the nature of employee grievances regarding internal operations rather than matters of public concern, and the village was not required to tolerate such conduct where it reasonably believed that it would disrupt its operations, undermine the chief's authority, and destroy working relations within the fire department.

11. ADMINISTRATIVE LAW—*village fireman had no due process right to dismissal hearing for violating admonition specified in prior proceeding.* A village fireman who was afforded a proper hearing before being suspended for communicating a disruptive memorandum, and pursuant thereto was admonished that similar behavior in the future would result in his dismissal, had no due process right to a subsequent hearing before his dismissal for communicating a similar disruptive memorandum a few months later.

Appeal from the Circuit Court of Cook County; the Hon. Albert Green, Judge, presiding.

John E. Norton, of Chicago, appellant *pro se.*

Thomas H. Donohoe, of Chicago, for appellees.

JUSTICE RIZZI delivered the opinion of the court:

Plaintiff, John E. Norton, initiated this judicial proceeding by filing a complaint for administrative review and declaratory judgment. A third amended complaint was subsequently filed by plaintiff, *pro se*, naming as defendants Paul C. Nicholson, Frank G. Benak, Lois J. Fleming and the Village of Western Springs (the Village). In his third amended complaint, consisting of eight counts and three volumes of attached exhibits, plaintiff sought the issuance of a writ of *certiorari* for judicial review of a decision of an administrative agency, *mandamus*, declaratory relief, injunctive relief and damages pursuant to 42 U.S.C. §1983 (1976). The trial court dismissed the third amended complaint on the basis that it was insufficient to state a cause of action, and denied plaintiff leave to file a fourth amended complaint. We affirm.

Defendant Benak is the fire chief for the Village Department of Fire and Emergency Medical Services (the Department). Plaintiff was employed for 10 years as a part-time employee for the Department. He was classified as a fire fighter/EMT and he received a salary on an hourly basis for fire fighting, rescue and emergency medical duties, conducting training and educational sessions, stand-by coverage, and other special duties.

On July 2, 1984, plaintiff prepared a memorandum which he addressed to the Village "Chain of Command." He distributed the memorandum to four lieutenants who were his immediate superiors in the Department. The memorandum was critical of a change in fire apparatus response and procedure, and the memorandum made it plain that the plaintiff had unsuccessfully attempted to bring his criticism to the attention of the fire chief, Benak. The memorandum states:

> "I tried to clarify some of this with the Fire Chief, but he 'made a face' and walked away from me without a word. I can only guess that he couldn't answer unless it went through the 'chain of command.' "

Although plaintiff's memorandum was not addressed to Benak or given to Benak by plaintiff, it was received by Benak. On July 3, 1984, Benak sent the following letter to plaintiff:

> "I have received a copy of your July 2, 1984 memo.
>
> As I look over the past several years I can see the progress that has been made in the area of fire protection and emergency medical services. Much of this progress is due in no small part to your work.
>
> However, in every organization there comes a time when people must pull together without constant sniping, backbiting

and sarcasm. I am therefore requesting that you tender your resignation to this department, effective immediately."

On July 4, 1984, plaintiff sent Benak a letter advising him that he would not comply with his request to resign from the Department. Plaintiff's letter states, *inter alia*:

"I also find it difficult to comprehend how I am to be responsible for the 'constant sniping, backbiting, and sarcasm' going on in the department when, in fact, my presence at the fire station has minimized for the express purpose of avoiding the significant constant sniping, backbiting, and sarcasm that has been going on, often in your presence and sometimes at your instigation. I'm not accusing you of any wrongdoing, just that you have fostered the very activity that you now criticize. *Every* instance in which you have requested some action or inaction on my part I have complied with, with the exception of activities that were illegal, unethical, or unsafe. As you know, I have always felt compelled to comment, within the rational modes of communication, illegal activities, unsafe practices, tactical flaws, unsound training pedagogy, etc. You also should know that you, personally, have encouraged such activity on my part when it suited your needs (and I have documentation to that effect). What is most surprising is that during the lowest level of such activity on my part in the last decade, you should now find it objectionable.

* * *

Sincerely,
John E. Norton

'Assassination is the extreme form of censorship.'—George Bernard Shaw

'It's impossible for ideas to compete in the marketplace if no forum for their presentation is provided or available.'—Thomas Mann.

'Extremists think 'communication' means agreeing with them.'—Leo Rosten

'Knowledge without conscience is the ruination of the soul.'—Francois Rabelais" (Emphasis in original.)

On July 5, 1984, Benak sent plaintiff a letter advising him that he was being terminated as a fire fighter as of July 5, 1984. The letter states, *inter alia*:

"The grounds for dismissal are as follows:

(a) Village Personnel Manual
Chapter IX, Section 9.1

1.11 That the employee is antagonistic in attitude toward his superior officers or other employees, criticizing orders or policies issued and policies adopted by superiors or so acts as to interfere with proper cooperation of employees of the Village to the detriment of efficient public service.

(b) Fire Department Rules and Regulations 1—5—3

2. If the employee has been abusive in attitude, conduct and language in public, or toward the public, Village officials or employees, or has been abusive in conduct resulting in physical harm or injury to other employees or the public, either on or off duty.

Attached is Chapter XI of the Personnel Code stating appeal procedures."

Plaintiff requested an appeal of Benak's action in terminating his employment with the Department. Accordingly, an administrative hearing was had on July 23, 1984, before the village manager, Nicholson, and the director of personnel, Fleming. Plaintiff and his representative submitted both oral presentations and written documents. Also, plaintiff was afforded added time to submit additional documents, which were subsequently submitted.

One of the documents, dated July 26, 1984, submitted by plaintiff relates to his past verbal discussions with Benak on procedural and operation matters. The document states:

"[The] following is a conservative estimate of some of the verbal criticisms I've communicated to the Fire Chief within the past two years:

- At least on two occasions (prior to written memo) criticizing the commonly practiced 'alternator load dumping;'
- At least two times criticizing the allowance of oil and paint use or storage near oxygen cylinders;
- Over three times criticizing hose loads, lengths, or treatment;
- Several times criticizing lack of certain equipment to be carried on apparatus, Fire & EMS;
- Numerous times criticizing backing hazards, personnel riding on rear step, standing up in jump seats, not wearing air packs;
- Several times criticizing the methodology of hydrant testing and color coding of hydrants;
- Several times criticizing the lack of conforming to IDPH requirements in drills and paperwork;
- At least two times criticizing the elimination of a deluge on Engine 440;
- Numerous times criticizing lack of concern for ISO require-

ments (both before and after his 'newfound interest');
- Several times criticizing Engine 440's procedure on fire alarms in sprinklered buildings;
- Several times (over 3) criticizing contents of Engine 440's hydrant hookup bag;
- At least ten times criticizing his 'holding up' apparatus;
- One time criticizing practice of riding with open rear windows of ambulance 340 (a CO hazard);
- Numerous times about illegal use and nonuse of emergency warning devices;
- Several times criticizing not communicating the need to replace the 'Snorkel' with an aerial ladder;
- Several times criticizing the lack of use of apparatus to secure accident scenes;
- At least two times criticizing his lack of restriction as to who is qualified to drive fire apparatus;
- Two times criticizing his poor example by not wearing protective clothing at fire scene.

In *no* instance of any of the above verbal communication was any hint of violation of any rules or regulations given. In some of the above instances, raised voices and harsh words were generated by both of us and witnessed by others." (Emphasis in original.)

On August 16, 1984, Nicholson advised plaintiff of his written decision as the village manager. The decision, which changed plaintiff's dismissal to a 30-day suspension, provides, *inter alia*:

FINDINGS

"[My] findings regarding your appeal are as follows:

(1) That the disciplinary decision of the Director of Fire and Emergency Medical Services that your drafting and distribution of a memorandum dated July 2, 1984, addressed to 'The Chain of Command' from yourself constituted a violation of the above-referenced sections of the Village Personnel Manual and the Fire Department Rules and Regulations is affirmed.

(2) That the order of dismissal from the Department of Fire and Emergency Medical Services be reduced to suspension for a period of thirty (30) days without pay, effective August 16, 1984, and ending September 14, 1984.

(3) That the Director of Fire and Emergency Medical Services delineate in writing those specific elements of performance and conduct to which you are expected to conform, which are at-

tached hereto and upon which your performance shall be evaluated and reviewed over a ninety (90) day period commencing August 16, 1984, and ending November 15, 1984.

(4) That the Director of Personnel provide you with compensation for the period of time from July 5, 1984 through August 15, 1984, based upon your demonstrated level of participation with the department over the twelve (12) months preceding this action.

DISCUSSION

The foregoing findings are based upon my review of your actions [of] July 2, 1984, in the issuance of the subject memorandum. In the opinion of this reviewer, those actions were clearly a violation of the Western Springs Personnel Manual, Chapter IX, Section 9—1, 1.11 and Section 1—5—3, 2 of the Fire Department Rules and Regulations, in that as an employee, you were antagonistic in your attitude toward your superior, that you criticized his orders and policies as issued and adopted, and as such, interfered with the proper cooperation of employees at the Village to the detriment of efficient pubic service; clearly, a breach of minimum standards of conduct, and work performance.

Further, your actions in issuing your memorandum dated July 2, 1984, exhibit an attitude and type of individual behavior which, while in the past may have been tolerated, will no longer be tolerated or permitted. Such actions are not acceptable employee behavior.

Furthermore, your memorandum dated July 2, 1984, whether intended or otherwise, constituted an embarrassment to the Director of Fire and Emergency Medical Services, and a direct challenge to his authority as the chief operating officer of the department, Village management and the Village Board. The selected distribution of this memorandum to the officer core of the department constituted a disruptive action detrimental to the efficient operation of the department and the need for all employees within the department to cooperate toward the achievement of common organizational goals in the delivery of fire and emergency medical services to the residents of the Village of Western Springs.

Under the foregoing circumstances, in my judgment, Chief Benak did not act unreasonably, or in an arbitrary fashion in finding that your actions of July 2, 1984, were a serious breach of the provisions of the Western Springs Personnel Manual and

the Fire Department Rules and Regulations which warranted serious disciplinary action.

• • •

CONCLUSION

In conclusion, it is appropriate that I recognize the fact that you have made a contribution to the Western Springs Department of Fire and Emergency Medical Services. However, it is appropriate that we underscore that all employees must cooperate and work toward the achievement of common organizational goals and objectives as set forth by the department head, Village management and the Village Board. Failure to do so will result in further disciplinary action and/or possible dismissal from the department. It is our hope that the severity of this incident, and the resulting discipline, will serve to amend your behavior so as enable you to continue to be able to contribute to the department."

Pursuant to Findings paragraph (3), plaintiff was given a written directive from Benak, dated August 18, 1984, which provides:

"FROM: Frank C. Benak, Director of Fire and EMS

RE: John Norton Disciplinary Action

In order to promote departmental function and progress, the employee shall at all times conduct himself according to the following:

(1) Refrain from all activities in which the employee is antagonistic in attitude toward his superior officers, or other employees, criticizing orders or policies issued, and policies adopted by superiors, or so acts as to interfere with proper cooperation of employees of the Village to the detriment of efficient public service.

(2) Refrain from all activity in which the employee may induce, or attempt to induce, an officer or an employee of the Village to commit an unlawful act, or to act in violation of any lawful departmental or official regulation or order.

(3) In matters of general conduct not within the scope of departmental rules and regulations, the employee shall be governed by the ordinary and accepted rules of good behavior observed by law abiding and self-respecting citizens. He shall be held strictly responsible for disorderly, disgraceful, and unlawful conduct, or the commission of any act tending to bring discredit to, or adversely reflect upon, the department, whether on or off duty.

(4) When the employee wishes to discuss or question departmental rules or regulations, or lawfully issued orders or policies, the employee shall request an appointment with either the Assistant Chief or Chief of the department to discuss the matter.

Failure to observe basic rules of conduct and performance, as outlined in the Village Personnel and Fire Department Rules and Regulations, will result in further disciplinary action, as provided by the manuals."

Within 30 days from receipt of Benak's written directive, plaintiff filed his complaint for administrative review and declaratory judgment. On January 7, 1985, while the suit was pending in the circuit court, plaintiff wrote a memorandum addressed to the assistant fire chief, which criticized a proposed change in the use of some newly purchased fire department equipment. Plaintiff, the assistant fire chief and Benak were on the committee that had approved the prior method for the use of the new equipment. While he was a member of that committee, at the direction of committee members Benak and the assistant fire chief, plaintiff had written a report justifying the position that had been taken by that committee.

In his January 7, 1985, memorandum to the assistant fire chief, plaintiff made reference to the fact that as a member of the former committee, he had written a report justifying the position that had been taken by the former committee, and that he had done so at the direction of Benak and the assistant fire chief. After criticizing the proposed change, plaintiff stated in his January 7, 1985, memorandum:

"I guess I was just totally 'suckered' into an insincere ploy and became a party to deceitful communication."

Plaintiff also stated in his memorandum that in assessing the proposed change one "approach renders the following judgment: Either all three of us on the committee were really stupid, ill-advised, and naive; or we are guilty of willful deceit and connivance; or someone has an extremely short memory."

On January 31, 1985, Benak sent plaintiff the following letter terminating his employment:

"You are hereby notified that you are being terminated as a volunteer firefighter-EMT for the Village of Western Springs Department of Fire and Emergency Medical Services.

On August 17, 1984, as part of a proceeding which led to your suspension for thirty (30) days, you were requested orally and in writing to refrain from all activities in which you were antagonistic in attitude toward your superior officers. You were requested to refrain from actions which criticized orders or poli-

cies of supervisors, and to refrain from actions which interfere with the proper cooperation of employees of the village to the detriment of efficient public service.

The foregoing standard of conduct is set forth in the Village's Personnel Manual, and applies to all village employees. Further, the Fire Chief's memorandum of August 17, 1984, concluded that your failure to observe such a rule of conduct could result in disciplinary action.

Your letter of January 7, 1985, to Assistant Chief Seivwright, a copy of which is attached, again clearly shows your antagonistic attitude toward superior officers, Mr. Seivwright, and myself; and the manner in which the criticism is stated creates an atmosphere wherein proper cooperation between Fire Department volunteers and their superiors is impossible. Your letter accuses Mr. Seivwright and myself of a conspiracy to mislead the Village Manager and the Board of Trustees; an accusation that is not true, but an accusation now made that raises an issue regarding my integrity and one that places my position with the Village Manager and the Board of Trustees in question. As a result, your actions lead me to again conclude that your presence is detrimental to the spirit of teamwork and cooperation needed in the Department of Fire and Emergency Medical Services, and therefore, I am terminating you as a volunteer firefighter-EMT."

Plaintiff sent a letter to Nicholson, the village manager, requesting an appeal of his termination. On February 5, 1985, Nicholson sent plaintiff the following notice affirming his termination:

"I am in receipt of an unsigned memorandum dated February 2, 1985, from yourself, appealing your termination from the Western Springs Department of Fire and EMS, effective January 31, 1985, by Director Frank Benak. Specifically, you request an appeal of the notice of termination under the provisions of Article 11—2, Disciplinary Appeal Procedures, Exclusive of Classified Service Employees.

REVIEW

I have completed a review of the facts leading to Chief Benak's disciplinary action of January 31, 1985. I have specifically reviewed your memorandum of January 7, 1985, addressed to Assistant Chief Seivwright, as well as your previous disciplinary record. Further, I have carefully reviewed the contents of the January 7th memorandum with the Village Attorney and

the President and Board of Trustees.

FINDINGS

As a result of my review of this specific action, I have concluded that a further hearing is not warranted. My findings are as follows:

1) That the contents of a memorandum from yourself to Assistant Chief Seivwright, dated January 7, 1985, are antagonistic toward your superior officers, and interfere with the proper cooperation of the department's employees to the detriment of efficient public safety service.

2) That your action in submitting the subject memorandum was contrary to a disciplinary proceeding on August 17, 1984, at which time you were requested orally and in writing to refrain from activities in which you were antagonistic in attitude toward your superior officers.

3) That the subject memorandum is a violation of basic standards of conduct, as set forth in the department's rules and regulations and the Village Personnel Manual; specifically Article 9.1.11.

4) The accusatory nature of the subject memorandum is detrimental to the spirit of teamwork and cooperation needed within the Department of Fire and Emergency Medical Services in order for that department to meet the health, safety and welfare needs of the residents of the Village of Western Springs.

CONCLUSION

In conclusion, your actions of January 7th, including the distribution of the memorandum, are not in keeping with acceptable standards of the employer/employee relationship, and certainly not in keeping with acceptable standards of employee conduct. As a result of the foregoing review of this latest incident, the decision of Director Benak is affirmed, and your termination as a Firefighter/EMT with the Western Springs Department of Fire and Emergency Medical Services sustained."

On February 28, 1985, plaintiff filed his first amended complaint for *mandamus*, declaratory relief, and administrative review relating to his suspension and termination. Eventually, plaintiff, *pro se*, filed his third amended complaint for *mandamus*, declaratory relief, and *certiorari* review.

●1 Initially, we note that this case does not fall within the jurisdictional ambit of the Administrative Review Act (Ill. Rev. Stat. 1987, ch.

110, pars. 3—101, 3—102). (*Quinlan & Tyson v. City of Evanston* (1975), 25 Ill. App. 3d 879, 324 N.E.2d 65.) The appropriate method of review of municipal administrative agency decisions is by way of a common law writ of *certiorari*. Thus, we will review this case as though *certiorari* had been granted by the circuit court. *Nowicki v. Evanston Fair Housing Review Board* (1975), 62 Ill. 2d 11, 15, 338 N.E.2d 186, 188; *Quinlan & Tyson*, 25 Ill. App. 3d at 884, 324 N.E.2d at 70.

●2 In a common law *certiorari* proceeding, the court determines from the record alone whether there is any evidence fairly tending to support the order reviewed, and the court cannot set aside the order unless it is contrary to the manifest weight of the evidence. Also, it is well established that a decision of an administrative agency should not be reversed unless it is contrary to the manifest weight of the evidence, and that in reviewing a decision of an administrative agency, the findings and conclusions on questions of fact are *prima facie* true and correct. It is not the court's function to resolve conflicting evidence. *Collura v. Board of Police Commissioners* (1986), 113 Ill. 2d 361, 372-73, 498 N.E.2d 1148, 1153; *Nowicki v. Evanston Fair Housing Review Board*, 62 Ill. 2d at 15, 338 N.E.2d at 188; *Piotrowski v. State Police Merit Board* (1980), 85 Ill. App. 3d 369, 374, 406 N.E.2d 863, 867.

●3 Here, it is plain from the admitted facts which we have previously set forth that the administrative agency's findings on August 16, 1984, that plaintiff's distribution of his July 2, 1984, memorandum addressed to "The Chain of Command" constituted a violation of the Village personnel manual and the fire department rules and regulations as set forth in the decision. Thus, we conclude that the administrative agency's order of August 16, 1984, is more than fairly supported by the evidence and is not contrary to the manifest weight of the evidence.

●4, 5 Moreover, as a result of its findings, it was within the realm of reasonable disciplinary action for the administrative agency to suspend plaintiff for a period of 30 days without pay, and to direct that the Director of Fire and Emergency Services delineate in writing those specific elements of performance and conduct to which plaintiff was expected to conform, and upon which plaintiff's performance was to be evaluated and reviewed over a 90-day period. Also, we take notice that no disciplinary action was brought against plaintiff for anything that he did during the 90-day period, and plaintiff does not allege that he refrained from any action or comment during the 90-day period. Thus, from the perspective of a judicial review of an administra-

tive ruling, plaintiff's challenge to the propriety of the August 18, 1984, written directive from Benak is moot.

In addition, in its August 16, 1984, decision, the administrative agency provided that "it is also appropriate that we underscore that all employees must cooperate and work toward the achievement of common organizational goals and objectives as set forth by the department head, Village management and the Village Board. Failure to do so will result in further disciplinary action and/or possible dismissal from the department. It is our hope that the severity of this incident, and the resulting discipline, will serve to amend your behavior so as to enable you to continue to be able to contribute to the department." This admonition and notice of possible dismissal if plaintiff did not amend his behavior was clearly not arbitrary or unreasonable in view of the administrative agency's findings.

●6 We next address the administrative agency's findings of February 5, 1985, that the contents of a memorandum from plaintiff to Assistant Chief Seivwright, dated January 5, 1985, were antagonistic toward plaintiff's superior officers and interfered with the proper cooperation of the Department's employees, and that plaintiff's action was contrary to the disciplinary proceeding on August 17, 1984, when he was requested to refrain from activities in which he was antagonistic toward his superior officers. We conclude that it is clear from the admitted facts which we have previously set forth that the administrative agency's findings of February 5, 1985, were more than fairly supported by the record and are not contrary to the manifest weight of the evidence.

We also conclude that based upon the entire record, it was within the realm of reasonable disciplinary action for the administrative agency to terminate plaintiff's employment, especially in view of the fact that he had previously been admonished and put on notice that his failure to amend his behavior would possibly result in dismissal. We therefore hold that a judicial review of this case in accordance with the law applicable to the judicial review of administrative agency decisions establishes that the administrative decisions in this case should be upheld. However, since the trial court dismissed the case on the basis that plaintiff failed to allege a cause of action, we believe that it is proper for us to examine the record, including the exhibits that are part of plaintiff's pleadings, to decide whether plaintiff's third amended complaint (Third Complaint) and proposed fourth amended complaint for damages and injunctive relief (Fourth Complaint) are sufficient to allege a separate cause of action for damages. See *Nowicki v. Evanston Fair Housing Review Board*, 62 Ill. 2d at 15, 338

N.E.2d at 188.

Plaintiff has made multifarious allegations and charges in his eight-count Third Complaint and two-count Fourth Complaint wherein he seeks compensatory damages, punitive damages, costs and attorney fees, as well as other relief to which he might be entitled. However, we agree with the statement in plaintiff's Fourth Compliant that the "gist of John Norton's claim against the Village" is whether the Village deprived him "of his constitutional rights to free speech and due process." Correlated to his due process claim is plaintiff's claim that he was dismissed without a hearing. Plaintiff's claims against the other defendants are likewise founded on whether the Village deprived him of his constitutional rights to free speech and due process and whether he was dismissed without a hearing.

●7 We shall first consider whether the allegations in the Third Complaint and the Fourth Complaint are sufficient to allege a cause of action founded upon an infringement of plaintiff's right to free speech as protected by the first amendment. It is settled law that public employment cannot be conditioned upon a basis that infringes the employee's constitutionally protected freedom of speech. However, as a matter of good judgment, the first amendment does not require a municipality to be run as a roundtable for employee complaints over internal office affairs. (*Connick v. Myers* (1982), 461 U.S. 138, 149, 75 L. Ed. 2d 708, 721, 103 S. Ct. 1684, 1691.) To this end, the municipality, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to dismiss employees whose conduct hinders efficient operation of the municipality or its departments, and to do so with reasonable dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony and untimely impair the efficiency of operations of the municipality. (*Arnett v. Kennedy* (1974), 416 U.S. 134, 168, 40 L. Ed. 2d 15, 41, 94 S. Ct. 1633, 1651 (Powell, J., separate opinion).) Thus, our task is to seek a balance between the freedom of the employee, as a citizen, in commenting upon matters which conceivably could be of public concern and the interest of the municipality, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering v. Board of Education* (1968), 391 U.S. 563, 568, 20 L. Ed. 2d 811, 817, 88 S. Ct. 1731, 1734-35.

●8 It is clear from the admitted facts in this case that plaintiff's conduct undermined the municipality's operation of the Department. In this regard, the manner, time and place in which plaintiff's communications were distributed become relevant. When a municipal em-

ployee affronts his superior by the manner, time and place of a communication, the municipality's institutional efficiency may be threatened not only by the content of the employee's message but also by these added factors which are present in the instant case.

●9 The context in which the dispute between plaintiff and the municipality arose is also significant in determining whether plaintiff's conduct undermined the municipality's operation of the Department. The record shows that there was a history of vocalized criticisms made by plaintiff to the fire chief, Benak. These criticisms went on for at least two years, and plaintiff himself states that "raised voices and harsh words were generated by both of us and witnessed by others" during that time. Moreover, plaintiff's criticisms relate to changes in policies which affected him personally or which he was involved in formulating. When employee speech relating to policy changes stems from an employment dispute concerning the very application of the policy changes to the speaker or to his past involvement in the creation of the policy that is to be changed, additional weight must be given to the position that the employee has threatened the necessary authority of the municipality to run its operations as it deems best. (See *Connick v. Myers*, 461 U.S. at 153, 75 L. Ed. at 724, 103 S. Ct. at 1693.) Thus, the admitted facts in this case as well as the circumstances surrounding those facts leave room for no other conclusion than that plaintiff's conduct undermined the municipality's operation of the Department.

●10 In addition, if indeed plaintiff's communications touched upon matters of public concern, it is plain that based upon plaintiff's exhibits and the facts alleged by him in his complaints, they did so in only a limited sense. We believe that the communications may more accurately be characterized as merely employee grievances concerning internal operations. Thus, the limited first amendment interest that may be involved here does not require that the municipality tolerate action which it reasonably believed would disrupt its operations, undermine the authority of its fire chief and destroy working relationships within the Department. We therefore conclude that based upon plaintiff's exhibits and the pertinent factual allegations he has made, the Third Complaint and the Fourth Complaint are not sufficient to allege a cause of action founded upon a violation of the first amendment. See *Connick v. Myers*, 461 U.S. at 154, 75 L. Ed. 2d at 724, 103 S. Ct. at 1694.

Plaintiff's attempt to allege a cause of action based upon a due process violation and a claim that he was dismissed without a hearing are equally without any legal basis. Plainly, the admitted facts do not support plaintiff's contentions.

On July 23, 1984, plaintiff had an administrative hearing to review whether he should be terminated because of his criticism of the fire chief and policies within the Department. Plaintiff and his representative submitted both oral presentations and written documents. Also, plaintiff was given added time to submit additional documents which were submitted later. As a result of the administrative hearing, on August 16, 1984, plaintiff was suspended from work for 30 days and admonished and given notice that he was subject to dismissal for similar behavior in the future. On January 5, 1985, plaintiff again circulated a memorandum that was critical of his superiors and policies within the Department. The memorandum included a statement that plaintiff felt he was "suckered" into "an insincere ploy" as a result of the actions of a committee, which included the fire chief and the assistant fire chief, and that as a result of the actions of the committee plaintiff "became a party to deceitful communication." On February 5, 1985, in accordance with the August 16, 1984, admonition and notice that plaintiff was subject to dismissal for future behavior similar to that for which he had been suspended, the Village dismissed the plaintiff.

●11 In our opinion, since plaintiff admits the authenticity and circulation of the January 5, 1985, memorandum, the document speaks for itself as establishing conduct by plaintiff in violation of the administrative decision of August 16, 1984, and for which he had been forewarned that he would be dismissed. Thus, it is clear that plaintiff was not entitled to another administrative hearing. Plaintiff's contentions that he was denied due process and that he was dismissed without a hearing are therefore baseless. Moreover, there being no presumption that the facts or the evidence would appear otherwise or different at another hearing, even if plaintiff's contentions had some possible foundation no useful purpose would be served by remanding the case on this point. See *Onesto v. Police Board* (1980), 92 Ill. App. 3d 183, 187, 416 N.E.2d 13, 17.

Accordingly, the order of the trial court dismissing the third amended complaint and denying plaintiff leave to file his fourth amended complaint is affirmed.

Affirmed.

FREEMAN, P.J., and WHITE, J., concur.

STATE OF ILLINOIS }
} SS
COUNTY OF COOK }

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

JOHN NORTON,	}	
Plaintiff,	}	
-vs-	}	No. 84 CH 8133
PAUL NICHOLSON, et al,	}	
Defendants.	}	

REPORT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled cause came on for a Hearing before the Honorable ALBERT GREEN, Judge of said Court, on Thursday, the 28th day of August, A.D., 1986 at 10:30 a.m.

APPEARANCES:

MR. JOHN NORTON,
appearing as Plaintiff pro se;

MR. THOMAS DONOHOE,
appearing on behalf of the Defendants

Hinda Hoffman
Official Court Reporter
Chancery Division

* * *THE COURT: Let the record reflect that this comes up as a motion to strike and dismiss the third amended complaint. The Court has reviewed the third amended complaint for mandamus, declaratory relief, and certiorari; reviewed the defendants' motion to dismiss the third amended complaint pursuant to the Code of Civil Procedure, Section 2-615 and also the motion to dismiss count four of the third amended complaint pursuant to the Code of Civil Procedure, Section 2-619.

* * *On the motion to dismiss this cause is before this Court pursuant to the defendant, Frank Benak's motion to dismiss count four of the third amended complaint, the defendants' motion to strike and dismiss the third amended complaint and the supplemental motion to strike. This Court will consider the 2-615 motion to strike first.

A 2-615 motion attacks only the sufficiency of a complaint, citing *Johnson v. Nationwide Business Forms, Inc.*, 41 Ili. App.3d 128. Such a motion should be granted only if it is clear that the plaintiff can prove no set of facts under the pleading which would entitle the plaintiff to relief, citing *Scmidt v. Henehan* (1986), 40 Ill.App.3d 798.

Additionally, the plaintiff must allege facts which are sufficient to bring his claim within the scope of the legally recognized cause of action, citing *Teter v. Clemens* (1986), 112 Ill.2d 252. With these standards in mind, the Court now turns to the case at hand.

In count one, the plaintiff alleges that he was a part-time fireman for the Village of Western Springs. He attempted to revise procedures for handling vehicle fires by issuing a memo. The plaintiff concedes that the memo, not attached to the copy of the complaint furnished this Court, concerned his grievances with the Department's procedure (The third amended complaint, paragraph 10). Sometime after the issuance of the memo, the Director of the department asked for the plaintiff's resignation. When he refused, he was fired.

On July 23, 1984, an administrative hearing was held. The written set of findings by the hearing officer reduced the dismissal to a 30-day suspension period. When the plaintiff returned to work, the Director allegedly denied the plaintiff the right to normal channels of communication concerning grievances. In count one, the plaintiff seeks a declaratory judgment.

The plaintiff has failed to allege that he suffered damage from this gag order.

In count two, the plaintiff claims that the defendants refused to supply evidence of misconduct and refused to specify charges

against the plaintiff. Since the plaintiff claims that he was reinstated, the issue is moot.

In count three, the plaintiff seeks a recision of the plaintiff's suspension. This court notes that plaintiff does not allege that he used the administrative channels, nor is this case here under administrative review. Therefore, the plaintiff has failed to exhaust his administrative remedies which is requisite to a judicial review of administrative decisions, and I cite *Beard v. Board of Police Commissioners* (1985), 130 Ill.App.3d 692.

Count four is directed at Frank Benak, acting Director of the Department. As this defendant correctly points out, the plaintiff was suspended for 30 days and did not need the uniform during this period. As defendant also correctly points out, the plaintiff has failed to allege the facts which would put this Court within the purview of 42 United States Code §1983.

In count five, the plaintiff claims that when he was dismissed, his request for a hearing was denied. He alleged earlier in the third amended complaint that he received a hearing and was later reinstated. Therefore, this count is moot.

Count six and seven allege no new set of facts or causes of action, since the underlying allegations are contained in counts which have been dismissed, these counts will also be dismissed.

Count eight alleges that the Director prevented the plaintiff from teaching a class. The plaintiff seeks a declaratory judgment. However, a declaratory judgment is a remedy appropriate for construction--"for construction of any statute, municipal ordinance or other governmental regulation of any deed, will, contract or other written instrument." That's the Illinois Revised Statutes 1983, Chapter 110, Section 2701A. The plaintiff does not set forth facts which would put his claim under the purview of this statue.

More significantly, the plaintiff fails to state therein any legally recognizable cause of action.

Accordingly, the defendants' motion to strike and dismiss pursuant to Section 2-615 of the Illinois Code of Civil Procedure is granted. This Court need not consider the other motions to strike.

MR. NORTON: Your honor, can I just ask a question, if perhaps there's maybe a misunderstanding of fact. There are actually two dismissals in this case, separately alleged. One is a set of dismissals *[sic]* received in an administrative hearing.

THE COURT: I'm aware. I'm dismissing your whole complaint. You haven't set forth the cause of action. I don't think you can. Therefore, I'm going to dismiss this third party *[sic]* amended complaint, which is actually the fourth complaint with prejudice. There is no just cause in delaying the appeal.* * *

STATE OF ILLINOIS }
} SS
COUNTY OF COOK }

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

JOHN NORTON,	}	
Plaintiff,	}	
-vs-	}	No. 84 CH 8133
PAUL NICHOLSON, et al,	}	
Defendants.	}	

ORDER

THIS CAUSE COMES ON TO BE HEARD on Defendant's Motions to Strike and Dismiss the Third Amended Complaint. The Court has read the Memoramda submitted by the parties in support of and in opposition to the Motions, has heard the oral arguments of the parties and is fully advised in the premises.

IT IS ORDERED:

1. Count I is dismissed since the Plaintiff has not and cannot allege that he sustained damage from the order complained of.

2. Count II is dismissed because it is moot.

3. Count III is dismissed because Plaintiff failed to exhaust his administrative remedies.

4. Count IV is dismissed on the ground that Plaintiff had no need for the clothing or equipment in issue during the period in question.

5. Count V is dismissed because it is moot.

6. Count VI is dismissed since Plaintiff has failed to state a legally recognized cause of action.

7. Count VII is dismissed since Plaintiff has failed to state a legally recognizable cause of action.

8. Count VIII is dismissed since the Third Amended Complaint shows on its face that Plaintiff is not entitled to a declaratory judgment and because Plaintiff has failed to state any legally recognizable cause of action.

The Third Amended Complaint is therefore finally dismissed in its entirety with prejudice and Plaintiff shall go hence without day. There is no just reason to delay the appeal of this cause.

ENTERED
CLERK OF THE CIRCUIT COURT
MORGAN M. FINLEY
OCT 15 1986
JUDGE: ALBERT GREEN
DEPUTY CLERK_____

Thomas H. Donohoe
Martin, Craig, Chester
& Sonnenschein
55 East Monroe Street
Suite 1200
Chicago, Ill. 60603
(312) 368-9700
Firm I.D. 90515

STATE OF ILLINOIS }
} SS
COUNTY OF COOK }

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

JOHN NORTON, }
Plaintiff, }
-vs- } No. 84 CH 8133
PAUL NICHOLSON, et al, }
Defendants. }

REPORT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled cause came on for a Hearing before the Honorable ALBERT GREEN, Judge of said Court, on Thursday, the 9th day of April, [1987] at the hour of approximately 11:30 a.m.

PRESENT:

MS. JUDITH TEETER,
appeared on behalf of the Plaintiff;

MR. THOMAS DONOHOE,
appearing on behalf of the Defendants

Ruby L. Prince
Official Court Reporter
Chancery Division
Circuit Court of Cook County

THE COURT: Norton versus Nicholson, 84 CH 8133. The matter comes on a Motion to Vacate. Will you identify yourselves for the record?

MS. TEETER: Judith Teeter for the Plaintiff.

MR. DONOHOE: Thomas Donohoe for the Defendants.

THE COURT: Let the Record reflect that the Court has reviewed the Motion to Vacate the Judgment [and] for Leave to Amend the Complaint; has reviewed the Motion to Amend the Plaintiff's Motion to to Vacate [and] for Leave to File a Memorandum Instanter on an amended briefing schedule. I have reviewed the Plaintiff's Memorandum in Support of the Motion to Vacate [and] for Leave to Amend the Complaint.

I have reviewed the Defendants' Memorandum in Opposition to the Motion to Vacate and for Leave to Amend, and Plaintiff's Reply to Defendants' Opposition to the Motion to Vacate.* * *

* * *THE COURT: All right, I'll address the Motion to Vacate.

The plaintiff moves this Court, pursuant to Illinois Revised Statutes, 1983, Section 2-1203(a), to vacate an order of dismissal and for leave to file a Fourth Amended Complaint.

On October 15, 1986, this Court entered an order dismissing the Third Amended Complaint. This order reflected this Court's decision of August 28, 1986, granting the defendants' Motion to Dismiss.

The plaintiff maintains that while this Court's order entered on October 15, 1986, addressed each individual count of the Third Amended Complaint, this Court did not decide whether these facts alleged would entitle him to relief.

Actually, this Court performed a detailed analysis of this complaint at the hearing on the defendant's motion, which took place on August 28, 1986. For the reasons set forth at that hearing, this Court will deny the plaintiff's Motion to Vacate Dismissal of the Third Amended Complaint.

As to the Motion to File a Fourth Amended Complaint, the plaintiff makes his motion pursuant to Section 2-1203(a) of the Illinois Code of Civil Procedure. Illinois Revised Statues 1983, Chapter 110, Section 2-1203(a) provides: "In all cases tried without a jury, any party may, within 30 days after entry of the judgment, file a motion for a rehearing, or a retrial or modification of the judgment or to vacate the judgment or for other relief."

The "other relief" referred to in this statute must be similar in nature to the forms of relief specified in this portion of the statute. And I cite *Fultz v. Havgan*, 49 Ill.2d 131. A motion for leave to amend is not a proper post-trial motion. I cite *People ex rel Endicott v. Huddleston*, 34 Ill.App.3d 799.

The decision to allow or deny amendment of the pleadings rests with the sound discretion of the Trial Court, citing *Montgomery Ward & Company v. Wetzel*, 98 Ill.App.3d 243.

Of primary consideration is whether amendment of the plead-ings would further the ends of justice, *Schenke v. Chicago Title & Trust Co.*, 128 Ill.App.3d 488. The appeal was denied, 101 Ill. 2d 593.

A plaintiff does not have an absolute right to amend. I cite *Lakeside Villas Homeowners Association v. Zale Construction Company* (1986), 145 Ili.App.3d 505.

This Court notes that this case was commenced in 1984. The plaintiff has had ample time to amend his pleadings, yet the plaintiff still asks this Court for leave to amend so that he can attempt to state a cause of action.

To allow him to amend would not further the ends of justice, as the defendants have been required to defend themselves against this protracted litigation. Moreover leave to amend is not properly before this Court.

For these reasons, and for the reasons stated previously, this Court will deny the plaintiff's Motion to Vacate the Judgment and for Leave to Amend. Prepare the appropriate order.

MS. TEETER: May we add the language that there is no just reason to delay appeal?

THE COURT: There is nothing more final than what I just stated. Those magic words mean nothing. I dismissed this complaint and I won't let him file a fourth one.* * *

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

JOHN NORTON,	}	
Plaintiff,	}	
-vs-	}	No. 84 CH 8133
PAUL NICHOLSON, et al,	}	
Defendants.	}	

ORDER

THIS CAUSE COMES ON FOR HEARING on plaintiff's Motion to Vacate and for Leave to Amend. Due notice has been given; the Court is fully advised in the premises.

IT IS HEREBY ORDERED that both of plaintiff's Motions shall be and they are hereby denied, and that plaintiff shall go hence without day.

ENTERED
APR -9 1987
A. GREEN 120

Thomas H. Donohoe
Martin, Craig, Chester
& Sonnenschein
55 East Monroe Street
Suite 1200
Chicago, Ill. 60603
(312) 368-9700

August 16, 1984 **[R.C. 409-411]**

Mr. John E. Norton
Western Springs, Ill. 60558

RE: Disciplinary Appeal

Dear Mr. Norton:

Pursuant to the provisions of the Western Springs Personnel Manual, Chapter XI, Section 11-2, I have reviewed your appeal of your termination by the Director of Fire and Emergency Medical Services from the department for violations of Chapter IX, Article 9.1, Minimum Standards of Conduct and Work Performance, Section 1.11 of the Western Springs Personnel Manual and Section 1-5-3, 2 of the Fire Department Rules and Regulations.

As required by the Personnel Manual, an administrative hearing was held on July 23, 1984, at 10:00 a.m., at which time you and your representative were present for the opportunity to submit both written and oral comments on this disciplinary appeal. Subsequent to that, you were afforded an additional week to submit additional written information which you did on Monday, July 30, 1984. You again submitted further wriiten documentation on Monday, August 13, 1984.

FINDINGS

Based upon all of the facts presented by you and by the Director of Fire and Emergency Medical Services, after careful review of your personnel file and after consultation with the Director of Personnel and the Village Attorney, my findings regarding your appeal are as follows:

1) That the disciplinary decision of the Director of Fire and Emergency Medical Services that your drafting and distribution of a memorandum dated July 2, 1984, addressed to "The Chain of Command" from yourself constituted a violation of the above-referenced sections of the Village Person-

nel Manual and the Fire Department Rules and Regulations is affirmed.

2) That the order of dismissal from the Department of Fire and Emergency Medical Services be reduced to suspension for a period of thirty (30) days without pay, effective August 16, 1984, and ending September 14, 1984.

3) That the Director of Fire and Emergency Medical Services delineate in writing those specific elements of performance and conduct to which you are to conform, which are attached hereto and upon which your performance shall be evaluated and reviewed over a ninety (90) day period commencing August 16, 1984, and ending November 15, 1984.

4) That the Director of Personnel provide you with compensation for the period of time from July 5, 1984, through August 15, 1984, based upon your demonstrated level of participation with the department over the twelve (12) months preceding this action

DISCUSSION

The foregoing findings are based upon my review of your actions July 2, 1984, in the issuance of the subject memorandum. In the opinion of this reviewer, those actions were clearly a violation of the Western Springs Personnel Manual, Chapter XI, Section 9-1, 1.11, and Section 1-5-3, 2 of the Fire Department Rules and Regulations, in that as an employee, you were anagonistic in your attitude toward your superior, that you criticized his orders and policies as issued and adopted, and as such, interfered with the proper cooperation of employees at the Village to the detriment of efficient public service; clearly a breach of minimum standards of conduct, and work performance

Further, your actions in issuing your memorandum dated July 2, 1984, exhibit an attitude and type of individual behavior which, while in the past may have been tolerated, will no longer be tolerated or permitted. Such actions are not acceptable employee behavior.

Furthermore, your memorandum dated July 2, 1984, whether intended or otherwise, constituted an embarassment of *[sic]* the Director of Fire and Emergency Medical Services, and a direct challenge to his authority as the chief operating officer of the department, Village management and the Village Board. The selected distribution of this memorandum to the officer core of the department constituted a disruptive action detrimental to the efficient operation of the department and the need for all employees within the department to cooperate toward the achievement of common organizational goals in the delivery of fire and emergency medical services to the residents of the Village of Western Springs.

Under the foregoing circumstances, in my judgment, Chief Benak did not act unreasonably, or contrary to Village policy and procedures, or in an arbitrary fashion in finding that your actions of July 2, 984, were a serious breach of the provisions of the Western Springs Personnel Manual and the Fire Department Rules and Regulations which warranted serious disciplnary action.

Regarding your request that all written documentation regarding this incident and your subsequent appeal be removed from your personnel record, the request is denied. It is not now, nor never has been the policy of the Village of Western Springs to remove pertinent information from personnel files on a selective basis. You are, however, advised that under present Illinois law, you have the right to review your personnel file and to file any written comments or objections you may have regarding any specific information which is contained in it. These comments or objections shall be filed in and become a permanent part of your record with the Village.

Finally, regarding your memorandum dated August 13, 1984, in which you question the actions of Fire Department personnel on Saturday, August 4, at approximately 3:30 p.m., I have carefully reviewed the facts regarding this incident, and find that they have no bearing on this disciplinary matter in which you are

involved.

CONCLUSION

In conclusion, it is appropriate that I recognize the fact that you have made a contribution to the Western Springs Department of Fire and Emergency Medical Services. However, it is also appropriate that we underscore that all employees must cooperate and work toward the achievement of common organizational goals and objectives as set forth by the department head, Village management, and the Village Board. Failure to do so will result in further disciplinary action and/or possible dismissal from from the department. It is our hope that the severity of this incident and the resulting discipline, will serve to amend your behavior so as to continue to be able to contribute to the department.

Sincerely yours,

Paul C. Nicholson
Village Manager

Attachment

cc: President and Board of Trustees
Director of Fire and EMS
Personnel Director
Village Attorney

August 17, 1984 **[R.C. 412]**

TO: Paul C. Nicholson, Village Manager
FROM: Frank G. Benak, Director of Fire and EMS
RE: John Norton Disciplinary Action

In order to promote departmental function and progress, the employee shall at all times conduct himself according to the following:

1) Refrain from all activities in which the employee is antagonistic in attitude toward his superior officers, or other employees, criticizing orders or policies issued, and policies adopted by superiors, or so acts as to interfere with proper cooperation of employees of the Village to the detriment of efficient public service.

2) Refrain from all activity in which the employee may induce, or attempt to induce, an officer or an employee of the Village to commit an unlawful act, or to act in violation of any lawful departmental or official regulation or order.

3) In matters of general conduct not within the scope of departmental rules and regulations, the employee shall be governed by the ordinary and accepted rules of good behavior observed by law abiding and self-respecting citizens. He shall be held strictly responsible for disorderly, disgraceful, and unlawful conduct, or the commission of any act tending to bring discredit to, or adversely reflect upon, the department, whether on or off duty.

4) When the employee wishes to discuss or question departmental rules or regulations, or lawfully issued orders or policies, the employee shall request an appointment with either the Assistant Chief or Chief of the department to discuss the matter.

Failure to observe basic rules of conduct and performance, as outlined in the Village Personnel and Fire Department Rules and Regulations, will result in further disciplinary action, as provided by the manuals.

February 5, 1985 **[R.C. 440-441]**

Mr. John E. Norton
3917 Grand Avenue
Western Springs, Ill. 60558

Re: Request for Appeal - Notice of Termination 1/31/85

Dear Mr. Norton:

I am in receipt of an unsigned memorandum dated February 2, 1985, from yourself, appealing your termination from the Western Springs Department of Fire and EMS, effective January 31, 1985, by Director Frank Benak. Specifically, you request an appeal of the notice of termination under the provisions of Article 11-2, Disciplinary Appeal Procedures, Exclusive of Classified Service Employees.

REVIEW

I have completed a review of the facts leading to Chief Benak's disciplinary action of January 31, 1985. I have specifically reviewed your memorandum of January 7, 1985, addressed to Assistant Chief Seivwright, as well as your previous disciplinary record. Further, I have carefully reviewed the contents of the January 7th memorandum with the Village Attorney and the President and Board of Trustees.

FINDINGS

As a result of my review of this specific action, I have concluded that a further hearing is not warranted. My findings are as follows:

1) That the contents of a memorandum from yourself to Assistant Chief Seivwright, dated January 7, 1985, are antagonistic toward your superior officers, and interfere with the proper cooperation of the department's employees to the detriment of efficient public safety service.

2) That your action in submitting the subject memorandum was contrary to a disciplinary proceeding on August 17, 1984, at which time you were requested orally and in writing to refrain from activities in which you were anatgonistic in attitude toward your superior officers.

3) That the subject memorandum is a violation of basic standards of conduct, as set forth in the department's rules and regulations and the village personnel manual; specifically Article 9.1.11.

4) The accusatory nature of the subject memorandum is detrimental to the spirit of teamwork and cooperation needed within the Department of Fire and Emergency Medical Services in order for that department to meet the health, safety, and welfare needs of the residents of the Village of Western Springs.

CONCLUSION

In conclusion, your actions of January 7th, including the distribution of the memorandum, are not in keeping with acceptable standards of the employer/employee relationship, and certainly not in keeping with acceptable standards of employee conduct. As a result of the foregoing review of this latest incident, the decision of Director Benak is affirmed, and your termination as a Firefighter/EMT with the Western Springs Department of Fire and Emergency Medical Services sustained.

Sincerely yours,

Paul C. Nicholson
Village Manager

cc: Frank G. Benak, Director of Fire and EMS
Robert Ekroth, Esq.
President and Board of Trustees

[R.C. 120-153]

VILLAGE OF WESTERN SPRINGS
PERSONNEL MANUAL

Adopted by the President
and Board of Trustees:
February 1978

Effective:
April 1, 1978

inter alia:

INTRODUCTION

It is the purpose of these Personnel Policies to establish normal procedures which will serve as guidelines to administrative action concerning the various personnel activities and transactions. These policies are intended to indicate the customary and most reasonable methods whereby the aims of the personnel program may be carried out. It should be made clear that athe policies contained in this Personnel Policy Manual apply to all employees of the Village.* * *

Your privileges, duties and responsibilities are, of course, more numerous than those outlined in this manual. Should any question arise about your job—your supervisor, your Department Head or personnel officer would be happy to answer them.* * *

CHAPTER II
EMPLOYMENT REQUIREMENTS

2.1 Village of Western Springs Equal Employment Opportunity

It is the policy and intent of the Village of Western Springs to provide quality of opportunity in employment to all persons.* * * This policy applies to all phases of full, part-time, temporary, and seasonal employment including, but

not limited to: recruitment, hiring, placement, promotion, demotion, or transfer; reduction in force, recall, or termination* * *.

It is the responsibility of every Department Head and Supervisor to cooperate in the implementation of this policy.

Failure of any employee to perform in a manner consistent with this policy will constitute grounds for reprimand, suspension, demotion, or dismissal from the Village's employ.* * *

CHAPTER VIII
EMPLOYEE CONDUCT AND REGULATIONS

8.2 Performance Appraisal

The Department Head shall develop, adopt, and maintain a system whereby the Department Heads shall periodically appraise and report to the Village Manager on the performance of employees in the Village service for purposes of employee development and improvement of work performance. Each Department Head shall discuss with each subordinate ways in which the individual's performance could be improved. Each Department shall maintain such performance reports as a part of each employee's permanent personnel file.* * *

CHAPTER IX
TYPES OF DISCIPLINARY ACTION

9.1 Minimum Standards of Conduct and Work Performance

The tenure of every employee shall be contingent upon acceptable conduct and satisfactory performance of duties. Failure to meet minimum standards of conduct and work performance of any of the following listed reasons, such list not to be considered all inclusive, shall be sufficient to dismiss an employee.

1.1 That the employee is incompetent, negligent, or inefficient in the performance of assigned duties.

1.2 That the employee has been abusive in attitude, conduct and language in public, or towards the public, Village officials or employees, or has been abusive in conduct resulting in physical harm or injury to other employees or the public, either on or off duty.

1.3 That the employee has violated any lawful or official regulation, order or rule, or failed to obey any lawful and reasonable direction given by a superior when such violation or failure to obey amounts to insubordination or serious breach of discipline which may reasonably be expected to lower morale in the organization or to result in loss, inconvenience, or injury to the Village or the public.* * *

1.11 That the employee is antagonistic in attitude toward his superior officers or other employees, criticizing orders or policies issued and policies adopted by superiors or so acts to interfere with proper cooperation of employees of the Village to the detriment of efficient public service. * * *

9.2 General Types of Disciplinary Action

Disciplinary action may include Suspension Without Pay, Dismissal, Demotion* * *.

9.4. Suspension

Any action on the part of employee which is in violation of orders of Supervisors or contrary to Departmental or Village policy or rules, but not serious enough to warrant dismissal, may be disciplined by suspension without pay.* * *

* * *The individual employee has the right of appeal in accordance with Chapter 11 of this Personnel Manual within two (2) working days of notification of the Department

Head regarding suspension or dismissal. This appeal shall be in writing and addressed to the Village Manager who shall then notify the Village President and the Board of Trustees of such appeal.* * *

9.5 Dismissal

The Department Head with the approval of the Village Manager may dismiss, with the exception of classified service personnel, any employee with just cause. The notice of dismissal shall be in writing and shall state the specific charges in a clear manner so that the employee will understand the charges made against him and will be able to answer them if so desired.* * *

CHAPTER XI

GRIEVANCES & DISCIPLINARY APPEAL PROCEDURES

11.1 Grievances

It is the policy of the Village Administration to encourage employees to discuss with their supervisors or Department Heads any problems they may have so that grievances may be cleared up. If an employee has any complaint or grievance concerning classification, working conditions, salary or other matters relative to employment, the employee should act as follows:

1. The employee should first discuss the problem with his immediate supervisor.
2. If the supervisor cannot offer a solution satisfactory to the employee, an appointment should be made with the Department Head to to discuss the problem.* * *

11.2 Disciplinary Appeal Procedures

Employees may appeal any disciplinary action taken by a supervisor in the following ways:

1. Within two working days after being notified of the disciplinary action, the employee must submit, in writing, reasons for appealing the action. This memorandum shall be sent to the Department Head, who shall forward it within two days of receipt with pertinent comments to the Village Manager

2. On request of the employee the Village Manager shall conduct a hearing into all circumstances surrounding the complaint or appeal and make a decision in the matter. The Village Manager's decision in the matter is final and the employee will so be notified in writing. A copy of this notification will be inserted in the employee's personnel file.* * *

[R.C. 155-168]

WESTERN SPRINGS

DEPARTMENT OF FIRE & EMS

SECTION 1. Rules and Regulations

inter alia:

1-1. Introductory Material

1-1-1. Departmental Statement of Purpose of Goals

The Western Springs Fire Department is established and empowered under Chapter 24, 11-6-1 of the Illinois Revised Statutes and Title 2, Chapter 4, of the Western Springs Municipal Code. The Fire Department is created to promote and protect the health, safety, welfare, and convenience of the public; to provide protection from fire for life and property and to regulate the prevention and control of fire therein.

1-1-2. Importance of Rules Regulations

The publication of the Rules and Regulations provides a basis for the orderly and disciplined performance of duty. Its provisions provide the foundation departmental personnel policy and the authority for disciplinary action. The Rules and Regulations should promote knowledge of what is expected of all members, ranks, and assignments and thereby provide a framework in which to conduct the day-to-day operations of department personnel.

It is essential for an effective and efficient fire department that fire personnel familiarize themselves thoroughly with the material contained hereafter.

1-1-3. Oath of Office

Members of the W.S.F.D. shall make and subscribe to

the following Oath of Office at the time of entry into the department:

> I, _____, having been appointed as a member of the Western Springs Fire Department, do solemnly swear that I will support the Constitution of the United States of America, and of the State of Illinois, the Ordinance of the Village of Western Springs and the Rules and the Regulations of the Western Springs Fire Department and that I will faithfully discharge the duties of a member of the Fire Department to the best of my ability.

1-2. Definitions

1-2-1. Chain of Command:
The unbroken line of authority extending from the Fire Chief, Assistant Chief, through subordinates at each level of command down to the level of execution.

1-2-2. Commanding Officer:
A superior officer assigned to exercise command over any unit of the Department.

1-2-3. General Order:
A permanent written order issued by the Fire Chief prescribing policies and procedures governing the affairs and operations of the Fire Department.

1-2-4. Order:
An instruction or directive, either written or oral, issued by a superior or commanding officer to a subordinate or a group of subordinates in the course of pursuing duty.

1-2-5. Shall:
The word "shall", whenever used, indicates that the action is mandatory.

1-2-6. Should:

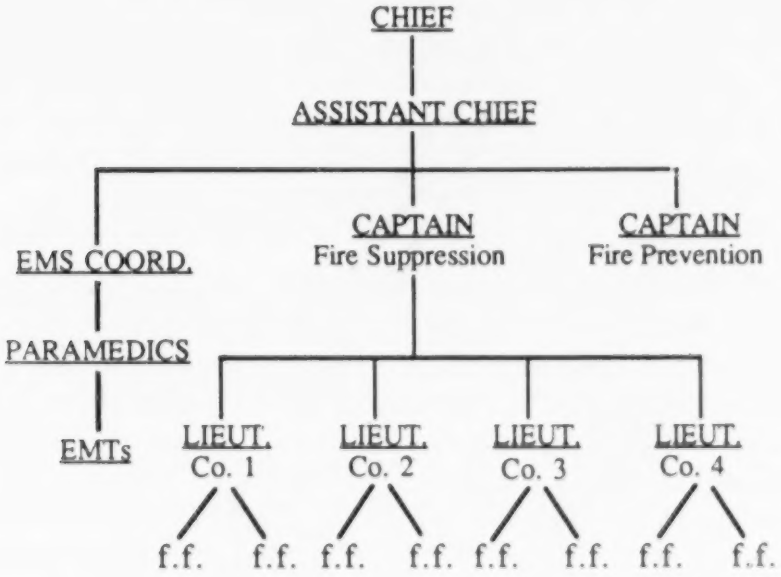
The word "should" is advisory. Where used it is intended that while the procedure is not mandatory, it would be followed in the best interest of the Department.

1-2-7. Special Order:

A permanent written order issued by the Fire Chief prescribing policies and procedures governing the affairs of the Department.

1-3. Organization

1-3-1. The organization of the Western Springs Fire Department is set forth in the following chart. The designated chain of command should be followed in all cases.* * *



1-4-8. Performance Appraisal:

The Fire Chief, shall develop, adopt, and maintain a system whereby the Fire Chief shall periodically appraise and report to the Village Manager on the performance of Village fire and emergency medical service for

purposes of employee development and improvement of work performance. The Fire Chief shall discuss with each subordinate ways in which the individual's performance could be improved. The Fire Department shall maintain such performance reports as a part of each employee's permanent personnel file.* * *

1-4-10. Leave of Absence:

Firefighters may request a leave of absence for good cause. Request for such leave shall be made in writing to the Fire Chief at least two weeks prior to the commencement of such leave.* * *

1-5. Rules and Regulations

1-5-1. Obedience to Orders

Members shall be held strictly accountable for obedience to ordres of superior officers rightfully given. Ignorance of laws, rules, regulations, practices, and procedures, rights or duties shall not relieve members of the duty to obey superior officers, or from penalties with respect to violations as prescribed herein.* * *

1-5-3. Offenses/Penalties

In matters of general conduct not within the scope of Departmental rules or regulations, members shall be governed by the ordinary and accepted rules of good behavior observed by law abiding and self respecting citizens. They shall be held strictly responsible for disorderly, disgraceful or unlawful conduct or for the commission of any act tending to bring discredit to or adversely reflect upon the Department while on or off duty.

Members or other employees who shall be found guilty of infractions of any of the rules, regulations, practices and procedures of the Fire Department of the Village of Western Springs, or specifically of the offenses listed

herein, shall be subject to disciplinary action:

1. If the employee is incompetent, negligent, or inefficient in the performance of assigned duties.
2. If the employee has been abusive in attitude, conduct and language in public, or towards the public, Village officials or employees, or has been abusive in conduct resulting in physical harm or injury to other employees or the public, either on or off duty.
3. If the employee has violated any lawful or official regulation, order or rule, or failed to obey any lawful and reasonable direction given by a superior.
4. If the employee has taken for personal use a fee, gift or any valuable thing in the course of work.
5. If the employee has been convicted of a criminal offense.* * *

1-6. Disciplinary Action

Firefighters who are guilty of infractions of any of the rules, regulations, practices, and procedures of the Western Springs Fire Department shall be subject to disciplinary action.

The Fire Chief shall have the power of suspension of any any firefighter for any infractions. The Fire Chief also has the authority to determine if any firefighter is in unfit condition to properly perform duties.* * *

Any grievance of disciplinary action shall follow the procedure set forth in the Village Personnel Manual for regular employees.

[R.C. 98-115]

IN THE CIRCUIT COURT OF COOK COUNTY COUNTY DEPARTMENT, CHANCERY DIVISION

JOHN E. NORTON, Plaintiff	}	
— vs —	}	NO. 84 CH 8133
PAUL C. NICHOLSON, FRANK G. BENAK, LOIS J. FLEMING, and the VILLAGE OF WESTERN SPRINGS, Defendants	}	

THIRD AMENDED COMPLAINT FOR MANDAMUS, DECLARATORY RELIEF, AND CERTIORARI REVIEW

COUNT I

The Plaintiff, **JOHN E. NORTON**, complains of the defendants, PAUL C. NICHOLSON, FRANK G. BENAK, LOIS J. FLEMING, and the VILLAGE OF WESTERN SPRINGS, and alleges as follows:

1. **PLAINTIFF** is resident of and property owner in the Village of Western Springs, Illinois, and has been a member of the Western Springs Fire Department as a "non-classified" public employee of the Village of Western Springs for the past ten years.

2. Defendant **PAUL C. NICHOLSON**, is the Village Manager for the Village of Western Springs and acted in that capacity at all times referred to in this count.

3. Defendant **FRANK G. BENAK**, is the Director of Fire and Emergency Medical Services for the Village of Western Springs and acted in that capacity at all times referred to in this count.

4. Defendant **LOIS J. FLEMING**, was the Assistant to

the Village Manager as well as the Director of Personnel for the Village of Western Springs and acted in that capacity at all times referred to in this count.

5. Defendant **VILLAGE OF WESTERN SPRINGS**, is a duly incorporated non-home rule Municipality, has been the public employer of the plaintiff for the past ten years, and likewise functioned in that capacity at all times in this count.

6. That the **PLAINTIFF** has been a part-time public employee of the Village of Western Springs as a "non-classified" member of the Western Springs Fire Department, receiving salary on an hourly basis for fire fighting, rescue, and emergency medical duties, as well as training/educational sessions, standby coverage, and other special duties. As such, the plaintiff has been subject to and regulated by the Village of Western Springs Personnel Manual, as adopted by the Village Board in April of 1978 **[Exhibit A-1]** and the Western Springs Department of Fire and EMS Rules and Regulations, as adopted in January of 1979 and revised circa January, 1983 **[Exhibit A-2]**.

7. That the **PLAINTIFF** has been actively and integrally involved throughout the past ten years, as a member and employee of the Western Springs Fire Department, with doing research, designing apparatus, formulating standard operating procedures, analyzing and critiquing tactical procedures, etc., for said department and the Village of Western Springs. The PLAINTIFF has had a significant role in input as well as impact on the fire apparatus and fire fighting procedures referred to in this count **[Exhibits B-1, B-2, B-3, B-4, B-5, B-6, B-7, B-8, B-9, B-10, B-11, and B-12]**

8. That the **PLAINTIFF** has significant formal educational background and training in the area of fire fighting tactics and fire fighting apparatus **[Exhibits C-1, C-2, C-3, and C-4]**, which placed him in the position of ethically having to respond critically—through proper channels—to situations, procedures, or operations which, in his knowledgeable and informed opinion, violated what he felt to be correct or otherwise

more appropriate courses of action.

9. That when a written order was issued on June 25, 1984 **[Exhibit D-1]**, revising a fire department procedure for handling vehicle fires which was originally formulated by the PLAINTIFF **[Exhibits D-2** and **D-3]**, an attempt was made by the **PLAINTIFF** to discuss the matter with Director of Fire and Emergency Medical Services, FRANK BENAK. However, said **DEFENDANT** simply made a face and walked away without uttering any response. Thus the **PLAINTIFF** discussed the issue with Lt. Ken Nelson, an immediate supervisor, and with advice from Lt. Nelson **[Exhibit D-4]** and in total accordance with both the "chain of command" requirements of the W.S.F.D. Rules and Regulations [§1-3-1 of **Exhibit A-2]** and the grievance procedures outlined in the Western Springs Personnel Manual [Page 26, Chap. XI, §11.1, ¶1.1 of **Exhibit A-1]**, the **PLAINTIFF** sent a memo expressing his concerns about the revision of the vehicle fire S.O.P., dated July 2, 1984, **[Exhibit D-5]**, to each of his immediate supervisors: Lt. Ken Nelson, Lt. Frank Zimmerman, Lt. George Benak, and Lt. Larry McCarty.

10. That said **MEMO OF JULY 2, 1984** contained only truthful statements and informed opinions of the PLAINTIFF, dealing with an issue with which the PLAINTIFF had intimate knowledge and interest **[Exhibits B-1** through **B-9]** Said **MEMO** was limited in distribution by the PLAINTIFF solely to the immediate supervisors itemized in paragraph 9 above and its sole intent was to grieve an issue of concern which the Director of Fire and Emergency Medical Services FRANK BENAK refused to discuss. It contains no reckless disregard for truth and falsity, no reckless disregard for consequences, and is certainly not an attempt to interfere with the efficient administration of the Western Springs Fire Department. "Innocent Construction" of Grievance Procedures in the Village of Western Springs Personnel Manual [Page 26 of **Exhibit A-1]** indicates that such grievance is not only allowable, but even

"encourage[d]" by Village policy, provided it conforms to the established procedural route(s). Therefore said **MEMO** is easily construed to be proper and responsible exercise of free speech as guaranteed by the First and Fourteenth Amendments of the U.S. Constitution.

11. That despite the **a)** receipt of verbal permission from an immediate supervisor, **b)** Village of Western Springs written policy which "encourage[s]...complaint and grievances", and **c)** total conformance with procedural requirements of both the Village and the Fire Department; the PLAINTIFF was sent a written request for his resignation by the Director of Fire and EMS, **FRANK BENAK**, dated July 3, 1984 **[Exhibit E-1]**. When the PLAINTIFF sent a written reply, dated July 4, 1984, refusing to resign **[Exhibit E-2]**, said defendant **FRANK BENAK**, notified the PLAINTIFF that he was immediately terminated as a member of the Western Springs Fire Department in a letter dated July 5, 1984 **[Exhibit E-3]**.

12. That **PLAINTIFF** immediately requested a hearing to appeal his termination in a letter to the Village Manager, PAUL C. NICHOLSON, dated July 5, 1984 **[Exhibit F-1]**, pursuant to appeal procedures in the Western Springs Personnel Manual [Pages 26 and 27 of **Exhibit A-1**], and that this letter also requested clarification of the specific grounds and evidence for dismissal. The **VILLAGE MANAGER** did acknowledge and grant the PLAINTIFF'S request for a hearing, but did not comment on or otherwise clarify the charges in a letter dated July 5, 1984 **[Exhibit F-2]**. A subsequent letter from the **VILLAGE MANAGER** to the PLAINTIFF, dated July 11, 1984 **[Exhibit F-3]**, set the date for the hearing and clarified the procedures, but did not clarify the charges or grounds for dismissal. Therefore the **PLAINTIFF** reiterated his previous request for the "specifics" and the "criteria" for his dismissal so as to provide an adequate defense, in a letter to the VILLAGE MANAGER dated July 17, 1984 **[Exhibit F-4]**. The **VILLAGE MANAGER** replied to the PLAINTIFF'S request in a letter dated July 17, 1984 **[Exhibit F-5]**, which merely

restated the rules that the PLAINTIFF was alleged to have violated in the Western Springs Personnel Manual and the Western Springs Fire Department Rules and Regulations. The **PLAINTIFF** again asked for more specificity and clarity in the vague charges, in a letter to the VILLAGE MANAGER dated July 26, 1984 **[Exhibit F-6]**, but this letter has never been answered or acknowledged.

13. That an **ADMINISTRATIVE HEARING** was held on July 23, 1984 to review PLAINTIFF'S appeal of his dismissal/termination by the DIRECTOR OF FIRE AND EMERGENCY MEDICAL SERVICES; with the Village Manager PAUL C. NICHOLSON, the Assistant to the Village Manager LOIS J. FLEMING, a witness for the Plaintiff PATRICK SENNETT, and the PLAINTIFF in attendance. Aside from testifying in his own behalf, **PLAINTIFF** was allowed to provide additional information to the VILLAGE MANAGER on July 26 and August13, 1984 **[Exhibits G-1, G-2, G-3, G-4, G-5, G-6, and G-7]**.

14. That Village Manager **PAUL C. NICHOLSON** presented his findings regarding PLAINTIFF'S appeal in a meeting on August 17, 1984; with **FRANK G. BENAK, LOIS J. FLEMING**, and the **PLAINTIFF** in attendance. Village Manager **PAUL NICHOLSON** presented the PLAINTIFF with and verbally commented on a written set of findings and conclusions, dated August 16, 1984 **[Exhibit H-1]**, which in effect reduced the dismissal to a disciplinary 30-day suspension without pay, and stipulated future behavior expected from the PLAINTIFF. The **VILLAGE MANAGER** also presented PLAINTIFF with a directive written by Director of Fire and EMS, **FRANK BENAK**, dated August 17, 1984 **[Exhibit H-2]**, which more specifically prescribed limitations on PLAINTIFF'S communications within the Fire Department.

15. That said **AUGUST 17th DIRECTIVE** from FRANK BENAK, in general effect, establishes a "gag rule" on the PLAINTIFF, and more specifically discriminates against the PLAINTIFF by denying him the right to normal channels for

communication of grievances, complaints, questions, and concerns afforded to all other members of the Western Springs Fire Department, as well as to all employees of the Village of Western Springs in general [cf.**Exhibits A-1** and **A-2**]. As such, said **DIRECTIVE** is a violation of PLAINTIFF'S Constitutional rights of free speech, protected by the First and Fourteenth Amendments of the U.S. Constitution. Said **DIRECTIVE** is also, in effect, a punishment for PLAINTIFF'S attempt to responsibly exercise his rights of private free speech and is thus similarly a violation of guaranteed First and Fourteenth Amendment rights.

> Acceptance of public employment is not abandonment of constitutionally protected rights.... Public employee cannot be discharged or otherwise penalized for exercise of right to freedom of speech as guaranteed by First Amendment; with regard to right of free speech, public employee may speak freely, as long as he does not impair the administration of the public service in which he is engaged. *U.S.C.A.* Const. Amend. 1; *Hasenstab v. Board of Fire and Police Com'rs of City of Belleville*, 71 Ill. App.3d 244, 389 N.E.2d 588; *Shafer v. Board of Fire and Police Com'rs of City of Calumet City*, 69 Ill.App.3d 677, 387 N.E.2d 976.

WHEREFORE, PLAINTIFF prays for **DECLARATORY JUDGMENT** from the Court, that the Directive, dated August 17, 1984, written by the Director of Fire and E.M.S., FRANK G. BENAK, to be void, illegal, and of no effect.

PLAINTIFF further prays that the Court assess **COSTS AND REASONABLE ATTORNEY'S FEES** against the defendants, NICHOLSON, BENAK, FLEMING, and the VILLAGE OF WESTERN SPRINGS pursuant to 42 U.S.C. §1988.

COUNT II

The PLAINTIFF, **JOHN E. NORTON,** further complains of the defendants NICHOLSON, BENAK, FLEMING, and the VILLAGE OF WESTERN SPRINGS, and alleges as follows:

1. That Paragraphs 1 through 15 of **COUNT I** are re-

alleged and incorporated herein by reference.

2. That the **DEFENDANTS**, either jointly or severally, refused to supply specific evidence or examples of language used by PLAINTIFF, in his memo of July 2, 1984, which supposedly constituted grounds for disciplinary action, this despite repeated requests by the PLAINTIFF **[Exhibits F-1** through **F-6]** and despite the clause in Chapter IX, §.9.5, ¶1 of the Village of Western Springs Personnel Manual which stipulates that "The notice of dismissal shall be in writing and shall state the charges in a clear manner so that the employee will understand the charges made against him and will be able to answer them if so desired" [Page 23, **Exhibit A-1**]. Such repeated refusal to specify charges by **DEFENDANTS**, either jointly or severally, constitutes both a substantive and procedural denial of PLAINTIFF'S rights to due process as guaranteed by the Fourteenth Amendment of U.S. Constitution.

3. That, either jointly or severally, the **DEFENDANTS' INTERPRETATION** of PLAINTIFF'S July 2, 1984 memo as prohibited employee conduct is contrary to the now standardized criteria for evaluating public employee speech. In such issues involving the regulation of speech, the governmental unit or body "has the duty to demonstrate the impairment of free speech is justified" and the criteria for such "burden of proof" has been well established in the Courts.

> *Dendor v. Board of Fire & Police Com'rs. of Northbrook*, 11 Ill.App.3d 582, 297 N.E.2d 316; *Shipp v. Davis*, 48 Ill.App.3d 463, 362 N.E.2d 822; *Shafer v. Board of Fire & Police Com'rs of City of Calumet City*, 69 Ill.App.3d 677, 387 N.E.2d 976; *Hasenstab v. Board of Fire & Police Com'rs of City of Belleville*, 71Ill.App.3d 244, 389 N.E.2d 588; *Shewmake v. Board of Fire & Police Com'rs. of Village of East Alton*, 71 Ill. App.3d 1052, 390 N.E.2d 536; and *Griggs v. Board of Fire & Police Com'rs of North Maine Fire Prot. Distr*, 102 Ill.App.3d 614.

4. That the **DEFENDANTS' INTERPRETATION** of PLAINTIFF'S July 2, 1984 memo as interfering with efficient administration of the Western Springs Fire Department is con-

trary to respected published sources/references regarding communications within fire department organizations **[Exhibits I-1, I-2, and I-3]**.

5. That PLAINTIFF'S communications have been consistent over the past decade and therefore the **DEFENDANTS' INTERPRETATION** of PLAINTIFF'S July 2, 1984 memo as "interfering with proper cooperation of Village employees to the detriment of efficient public service" is contrary to PLAINTIFF'S history as an exemplary public employee, dedicated to the betterment of public service **[Exhibits I-4, I-5, and I-6]**.

6. That the **ADMINISTRATIVE HEARING FINDINGS** of August 16, 1984 **[Exhibit H-1]**, are insufficient to meet the necessary "standard" or "proper test" to be applied to PLAINTIFF'S exercise of free speech—[ie. that the statements made were: **a)** false, **b)** involved a reckless intent and disregard for truth or falsity, and **c)** rendered the employee unfit for public service or substantially affected efficient administration of the public service involved]. The **DEFENDANTS**, jointly and severally, provided no subtantive evidence that demonstrates that PLAINTIFF'S July 2, 1984 memo had a detrimental effect on the administration of the Western Springs Fire Department, nor was any evidence given or stated as to the veracity of the statements contained within said memo. While conclusionary statements were made in the findings, no facts were ever adduced and such conclusions are to this day still unsubstantiated. Thus the **FINDINGS OF ADMINISTRATIVE HEARING** are "against the manifest weight of the evidence" and lacking in the substance necessary to fulfill the responsibility of a "burden of proof" by a governmental unit.

7. That, since the findings of the aforementioned administrative hearing are against the manifest weight of the evidence, the **PLAINTIFF'S MEMO** of July 2, 1984 and its distribution to his immediate supervisors was not grounds for suspension or any other disciplinary action. Therefore the 30-day suspension without pay punishment of PLAINTIFF by the **DEFENDANTS**, for exercising his rights of responsible free speech in accordance with procedural guidelines of the Village of

Western Springs Personnel Manual and Western Springs Fire Department Rules and Regulations, is a violation of the First and Fourteenth Amendments of the U.S. Constitution.

WHEREFORE, PLAINTIFF petitions the Court for a **CERTIORARI REVIEW** of the Administrative Hearing of July 23, 1984 pursuant to PLAINTIFF'S Disciplinary Appeal, to determine whether DEFENDANTS proceeded according to law, acted according to the evidence, and applied correct standards in disciplining the PLAINTIFF.

PLAINTIFF further prays that the Court assess **COSTS AND REASONABLE ATTORNEY'S FEES** against the defendants, NICHOLSON, BENAK, FLEMING, and the VILLAGE OF WESTERN SPRINGS, pursuant to 42 U.S.C. §1988.

COUNT III

The PLAINTIFF, **JOHN E. NORTON,** further complains of the defendants NICHOLSON, BENAK, FLEMING, and the VILLAGE OF WESTERN SPRINGS, and alleges as follows:

1. That Paragraphs 1 through 15 of **COUNT I** are realleged and incorporated herein by reference.

2. That Paragraphs 2 through 7 of **COUNT II** are realleged and incorporated herein by reference.

WHEREFORE, PLAINTIFF prays that the Court issue a **WRIT OF MANDAMUS** directed to the DEFENDANTS, commanding them jointly and severally to rescind PLAINTIFF's 30-Day Suspension without pay and to likewise reimburse the PLAINTIFF'S salary for same period, to the degree that the PLAINTIFF was available for duty.

PLAINTIFF further prays that the Court assess **COSTS AND REASONABLE ATTORNEY'S FEES** against the defendants, NICHOLSON, BENAK, FLEMING, and the VILLAGE OF WESTERN SPRINGS pursuant to 42 U.S.C. §1988.

COUNT IV

The PLAINTIFF, **JOHN E. NORTON**, further complains of the defendant FRANK BENAK, and alleges as follows:

1. That Paragraphs 1 through 15 of **COUNT I** are re-alleged and incorporated herein by reference.

2. That Paragraphs 2 through 7 of **COUNT II** are re-alleged and incorporated herein by reference.

3. That subsequent to the aforementioned Administrative Hearing of August 17, 1984 and the issuance of a disciplinary 30-day suspension to the PLAINTIFF, Director of Fire and Emergency Medical Services **FRANK BENAK** refused to allow reissuance of PLAINTIFF'S fire fighting clothing and equipment so that PLAINTIFF could partake in the activities of the department, this despite his official reinstatement and despite repeated requests by the PLAINTIFF through appropriate channels **[Exhibit J-1]**. Aside from preventing PLAINTIFF from participating in the activities of the Western Springs Fire Department, the **DEFENDANT'S ACTION** was stigmatizing and defamatory to PLAINTIFF'S reputation within the department. Such refusal, in effect, constitutes an additional punitive action by said **DEFENDANT** against PLAINTIFF, for his exercise of Constitutionally guaranteed rights of responsible free speech, as well as willful and wanton disregard for PLAINTIFF'S rights of due process under the Fifth and Fourteenth Amendments of U.S. Constitution.

4. That DEFENDANT **FRANK BENAK** wilfully and wantonly acted outside the scope of his official authority to effect his own personal discipline against PLAINTIFF and as such acted at best, in bad faith and at worst, in malice.

WHEREFORE, PLAINTIFF prays for **DECLARATORY JUDGMENT** by the Court, that the actions of Director of Fire and E.M.S. FRANK BENAK to refuse reissuance of PLAINTIFF'S fire fighting clothing and equipment to be void,illegal, and of no effect.

PLAINTIFF further prays for assessment of **EXEM-**

PLARY OR PUNITIVE DAMAGES against the defendant FRANK BENAK, or other such relief as the Court shall deem just and proper, pursuant to 42 U.S.C. §1983.

PLAINTIFF further prays that the Court assess **COSTS AND REASONABLE ATTORNEY'S FEES** against the defendant FRANK BENAK, pursuant to 42 U.S.C. §1988.

COUNT V

The PLAINTIFF, **JOHN E. NORTON**, further complains of the defendants NICHOLSON, BENAK, FLEMING, and the VILLAGE OF WESTERN SPRINGS, and alleges as follows:

1. That Paragraphs 1 through 8, plus 14 and 15 of **COUNT I** are re-alleged and incorporated herein by reference.

2. That Paragraphs 2 through 7 of **COUNT II** are re-alleged and incorporated herein by reference.

3. That when discussion occurred within the Western Springs Fire Department in December of 1984, about a rumored proposal to revise the apparatus response order to structure fires partly devised by PLAINTIFF **[Exhibit K-1]**, the **PLAINTIFF** discussed the issue with Assistant Chief Ian Seivwright and received permission from said Assistant Chief to submit PLAINTIFF'S concerns about the proposed change **[Exhibit K-2]**. Thus in total accordance with the procedures delineated in the Directive issued in August 17, 1984 by Director of Fire and E.M.S. FRANK BENAK **[Exhibit H-2]**, **PLAINTIFF** sent a memo, expressing his concerns about and questioning the rationale of the proposed changes in the apparatus response order, dated January 7, 1985 **[Exhibit K-3]**, to Assistant Chief Seivwright.

4. That said **MEMO OF JANUARY 7, 1985** contained only truthful statements, logical hypotheses, and informed opinions of the PLAINTIFF, dealing with an issue with which the PLAINTIFF had intimate knowledge, experience, and interest **[Exhibits B-1** through **B-9]**. Said **MEMO** was limited

in distribution by the PLAINTIFF solely to the afore-mentioned Assistant Chief Ian Seivwright and its sole intent was to question the proposed S.O.P. change. It contains no reckless disregard for truth or falsity, no reckless disregard for consequences, and is certainly not an attempt to interfere with the efficient administration of the Western Springs Fire Department **[Exhibit L-1]**. "Innocent Construction" of items #1 and #4 of the August 17, 1984 Directive **[Exhibit H-2]**, would indicate that PLAINTIFF could "discuss or question" policies provided not "criticizing of orders or policies issued" and if adhering to prescribed procedural route. Since PLAINTIFF was merely discussing and questioning a rumored or proposed policy, not even issued until June 1985 **[Exhibit L-2]**, said **MEMO** is easily construed to be proper and responsible exercise of free speech as guaranteed by the First and Fourteenth Amendments of the U.S. Constitution.

5. That despite the **a)** receipt of verbal permission from the Assistant Chief, **b)** a written directive that allows "questions and concerns" about policies, and **c)** total conformance with procedural requirements specifically prescribed for the PLAINTIFF; Director of Fire and E.M.S. **FRANK BENAK** sent PLAINTIFF a notice of termination dated January 31, 1986 **[Exhibit M-1]**.

6. That **PLAINTIFF** immediately requested a hearing to appeal his termination in a letter to the Village Manager PAUL NICHOLSON, dated February 2 1985 **[Exhibit N-1]**, pursuant to appeal procedures in the Western Springs Personnel Manual **[** Pages 26 and 27 of **Exhibit A-1]** .

7. That the **VILLAGE MANAGER** did acknowledge PLAINTIFF'S request in a letter dated February 5, 1985 **[Exhibit O-1]**, but denied an appeal hearing despite the clause in Chapter XI, §11.2, ¶2 of the Western Springs Personnel Manual, which stipulates that such a denial is not a discretionary matter [Pages 26 and 27 of **Exhibit A-1**].

8. That the **VILLAGE MANAGER'S DENIAL** of PLAINTIFF'S request for an appeal hearing, as required by

Western Springs Personnel Manual, constitutes a denial to PLAINTIFF of substantive and procedural due process as guaranteed by the Fourteenth Amendments of the U.S. Constitution.

9. That the **DEFENDANTS' INTERPRETATION** of PLAINTIFF'S January 7, 1985 memo as interfering with efficient administration of the Western Springs Fire Department is contrary to respected published sources/references regarding communications within fire department organizations **[Exhibits I-1, I-2, and I-3]**.

10. That PLAINTIFF'S communications have been consistent over the past decade and therefore the **DEFENDANTS'** interpretation of PLAINTIFF'S January 7, 1985 memo as "interfering with proper cooperation of Village employees to the detriment of efficient public service" is contrary to PLAINTIFF'S history as an exemplary public employee, dedicated to the betterment of public service **[Exhibits I-4, I-5, and I-6]**.

11. That, either jointly or severally, the **DEFENDANTS' INTERPRETATION** of PLAINTIFF'S January 7, 1985 memo as prohibited employee conduct is contrary to the now standardized criteria for evaluating public employee speech. In such issues involving the regulation of speech, the governmental unit or body "has the duty to demonstrate the impairment of free speech is justified" and the criteria for such "burden of proof" has been well established in the Courts.

> *Dendor v. Board of Fire & Police Com'rs. of Northbrook*, 11 Ill.App.3d 582, 297 N.E.2d 316; *Shipp v. Davis*, 48 Ill.App.3d 463, 362 N.E.2d 822; *Shafer v. Board of Fire & Police Com'rs of City of Calumet City*, 69 Ill.App.3d 677, 387 N.E.2d 976; *Hasenstab v. Board of Fire & Police Com'rs of City of Belleville*, 71Ill.App.3d 244, 389 N.E.2d 588; *Shewmake v. Board of Fire & Police Com'rs of Village of East Alton*, 71 Ill. App.3d 1052, 390 N.E.2d 536; and *Griggs v. Board of Fire & Police Com'rs of North Maine Fire Prot. Distr.* 102 Ill.App.3d 614.

12. That the **VILLAGE MANAGER'S FINDINGS**, as stated in his letter of February 5, 1985 **[Exhibit O-1]**, are insufficient to meet the necessary "standard" or "proper test" to

be applied to PLAINTIFF'S exercise of free speech—[ie. that the statements made were: **a)** false, **b)** involved a reckless intent and disregard for truth or falsity, and **c)** rendered the employee unfit for public service or substantially affected efficient administration of the public service involved]. The **DEFENDANTS**, jointly and severally, provided no subtantive evidence that demonstrates that PLAINTIFF'S January 7, 1985 memo had a detrimental effect on the administration of the Western Springs Fire Department, nor was any evidence given or stated as to the veracity of the statements contained within said memo. While conclusionary statements were made in the findings, no facts were ever adduced and such conclusions are to this day still unsubstantiated. Thus the **VILLAGE MANAGER'S FINDINGS** are "against the manifest weight of the evidence" and lacking in the substance necessary to fulfill the responsibility of a "burden of proof" by a governmental unit.

13. That, since the **VILLAGE MANAGER'S FINDINGS** of February 5, 1985 are against the manifest weight of the evidence, the PLAINTIFF'S memo of January 7, 1985 and its distribution to the Assistant Chief was not grounds for dismissal or any other disciplinary action. Therefore the dismissal of PLAINTIFF by the **DEFENDANTS**, from the Western Springs Fire Department, for exercising his rights of responsible free speech in accordance with procedural guidelines of the August 17, 1984 Directive by the Director of Fire and Emergency Medical Services FRANK BENAK, is a violation of the First and Fourteenth Amendments of the U.S. Constitution.

WHEREFORE, PLAINTIFF petitions the Court for a **CERTIORARI REVIEW** of the Village Manager's findings of February 5, 1985 pursuant to PLAINTIFF'S Disciplinary Appeal, to determine whether the DEFENDANTS proceeded according to law, acted according to the evidence, and applied correct standards in disciplining the PLAINTIFF.

PLAINTIFF further prays that the Court assess **COSTS AND REASONABLE ATTORNEY'S FEES** against the defendants, NICHOLSON, BENAK, FLEMING, and the

VILLAGE OF WESTERN SPRINGS pursuant to 42 U.S.C. §1988 (1976).

COUNT VI

The PLAINTIFF, **JOHN E. NORTON**, further complains of the defendants NICHOLSON, BENAK, FLEMING, and the VILLAGE OF WESTERN SPRINGS, and alleges as follows:

1. That Paragraphs 1 through 8, plus 14 and 15 of **COUNT I** are re-alleged and incorporated herein by reference.
2. That Paragraphs 2 through 7 of **COUNT II** are re-alleged and incorporated herein by reference.
3. That Paragraphs 3 through 13 of **COUNT V** are re-alleged and incorporated herein by reference.

WHEREFORE, PLAINTIFF prays that the Court issue a **WRIT OF MANDAMUS** directed to the DEFENDANTS, commanding them jointly and severally, that PLAINTIFF: a) be restored to his *status quo ante* with the Western Springs Fire Department, b) be reimbursed all salary and benefits lost as a result of his wrongful termination, and c) have all previous privileges with the Department and the Village restored.

PLAINTIFF further prays that the Court assess **COSTS AND REASONABLE ATTORNEY'S FEES** against the defendants, NICHOLSON, BENAK, FLEMING, and the VILLAGE OF WESTERN SPRINGS pursuant to 42 U.S.C. §1988 (1976).

COUNT VII

The PLAINTIFF, **JOHN E. NORTON**, further complains of the defendants NICHOLSON, BENAK, FLEMING, and the VILLAGE OF WESTERN SPRINGS, and alleges as follows:

1. That Paragraphs 1 through 8, plus 14 and 15 of **COUNT I** are re-alleged and incorporated herein by reference.
2. That Paragraphs 2 through 7 of **COUNT II** are re-

alleged and incorporated herein by reference.

3. That Paragraphs 3 through 13 of **Count V** are re-alleged and incorporated herein by reference.

WHEREFORE, PLAINTIFF, **in the alternative** to the relief sought in COUNT VI and without prejudice to the relief sought in COUNTS I, II, III, IV, V, and VIII, prays that the Court, at the very least, issue a **WRIT OF MANDAMUS** directed to the DEFENDANTS, commanding them jointly and severally to provide an appeal hearing *instanter*, pursuant to Chapter XI, §11.2, ¶ 2 of the Western Springs Personnel Manual.

PLAINTIFF further prays that the Court assess **COSTS AND REASONABLE ATTORNEY'S FEES** against the defendants, NICHOLSON, BENAK, FLEMING, and the VILLAGE OF WESTERN SPRINGS pursuant to 42 U.S.C. §1988.

COUNT VIII

The PLAINTIFF, **JOHN E. NORTON**, further complains of the defendant, FRANK G. BENAK, and alleges as follows:

1. That Paragraphs 1 through 8, plus 14 and 15 of **COUNT I** are re-alleged and incorporated herein by reference.

2. That Paragraphs 2 through 7 of **COUNT II** are re-alleged and incorporated herein by reference.

3. That Paragraphs 3 through 13 of **COUNT V** are re-alleged and incorporated herein by reference.

4. That **PLAINTIFF** is an I.D.P.H. certified Emergency Medical Technician Instructor and an I.D.O.T. certified Emergency Rescue Technician Instructor **[Exhibits P-1** and **P-2]**, as well as has a Bachelors and Masters Degree in Education, and as such is well qualified to instruct in EMT courses and seminars.

5. That **PLAINTIFF** has, and continues to routinely participate as an instructor in courses and seminars for EMTs and Paramedics throughout the region and the State **[Exhibits**

Q-1, Q-2, Q-3, and Q-4].

6. That **PLAINTIFF** was scheduled to participate as an instructor in an EMT Course sponsored by LaGrange Memorial Hospital and conducted by their E.M.S. Coordinator Marge Trinka during the Fall of 1985. When PLAINTIFF inquired about the specific schedule of his presentations, in a letter dated November 4, 1985 **[Exhibit R-1]** and finally verbally in a meeting with Marge Trinka, he was informed by her that she was personally prevented from using PLAINTIFF as an instructor for said EMT Course by Director of Fire and E.M.S. **FRANK BENAK**, as a necessary condition for using public classroom facilities of the Village of Western Springs **[Exhibit R-2]**.

7. That subsequent to this cause of action and dismissal of PLAINTIFF, the Defendant **FRANK G. BENAK,** actively, wilfully, selectively, and successfully barred the PLAINTIFF'S scheduled participation in teaching the aforesaid non-Village sponsored education activity conducted by a local hospital agency for the benefit of surrounding local communities.

8. That aside from preventing PLAINTIFF from participating in the instructional activities of a hospital sponsored class for the surrounding communities, the action by the Defendant **FRANK BENAK** was stigmatizing and defamatory to PLAINTIFF'S reputation and standing within the medical community. Such barring, in effect, constitutes a an additional punitive action taken against PLAINTIFF by said **DEFENDANT** for PLAINTIFF'S previous exercise of Constitutionally guaranteed rights of responsible free speech and likewise demonstrates a willful and wanton disregard for and a continued infringement of the PLAINTIFF'S free speech rights under the First and Fourteenth Amendments of the U.S. Constitution.

9. That Defendant **FRANK BENAK** wilfully and wantonly acted outside the scope of his official authority to effect his own personal vendetta against PLAINTIFF, as such acted at best, in bad faith and at worst, in malice.

WHEREFORE, PLAINTIFF prays for **DECLARA-**

TORY JUDGEMENT by the Court, that the actions of Director of Fire and E.M.S. FRANK BENAK to be void, illegal, and of no effect.

PLAINTIFF further prays for an assessment of **EXEMPLARY OR PUNITIVE DAMAGES** against the defendant FRANK BENAK, or other such relief as the Court shall deem just and proper, pursuant to 42 U.S.C.A. §1983.

PLAINTIFF further prays that the Court assess **COSTS AND REASONABLE ATTORNEY'S FEES** against the defendant, FRANK BENAK, pursuant to 42 U.S.C. §1988.

Respectfully submitted,

_____

JOHN E. NORTON

John E. Norton, Pro Se
3917 Grand Avenue
Western Springs, Ill.
60558
(708) 246-4692

STATE OF ILLINOIS }
} SS
COUNTY OF COOK }

JOHN E. NORTON, first being duly sworn on oath, deposes and states that he is the PLAINTIFF in the above **THIRD AMENDED COMPLAINT FOR MANDAMUS, DELARATORY RELIEF, AND CERTIORARI REVIEW**, and having both prepared and read said complaint, further states that the statements made or otherwise pleaded therein are true.

Respectfully submitted,

_____

JOHN E. NORTON

[R.C. 600-607]

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

JOHN E. NORTON, Plaintiff	}	
—VS—.	}	84 CH 8133
PAUL C. NICHOLSON, FRANK G. BENAK, LOIS J. FLEMING, and the VILLAGE OF WESTERN SPRINGS, Defendants	}	

FOURTH AMENDED COMPLAINT
FOR DAMAGES AND INJUNCTIVE RELIEF

The plaintiff, John E. Norton, by his attorneys, complains of the defendants, Paul C. Nicholson, Frank G. Benak, Lois J. Fleming, and the Village of Western Springs ("Village") as follows:

The gist of John Norton's claim against the Village is the Village's deprivation of his constititutional rights to free speech and due process. Norton was terminated without just cause soley for submitting a memorandum critical of a proposed change in a Fire Department apparatus response policy. This comment was speech on a matter of public concern, protected by the First Amendment. After his termination Norton was denied the hearing the Village rules require the Village to provide him. The deprivations Norton suffered are a violation of 42 U.S.C. §1983 and entitle him to relief under that Act.

COUNT I

1. Plaintiff makes this claim pursuant to 42 U.S.C.

§1983.

2. Plaintiff resides in the Village of Western Springs, Cook County, Illinois.

3. Defendants Paul C. Nicholson, Frank G. Benak, Lois J. Fleming served at all times relevant to this suit as the Village's Village Manager, Director of Fire and Emergency Medical Services, and Director of Personnel, respectively.

4. The Village is a non-home rule municipality pursuant to Ill.Rev.Stat. Ch. 24 par. 1-1-1 et. seq.

5. For approximately ten years through January 31, 1985, the Village employed plaintiff as a part-time firefighter and emergency medical technician in its Department of Fire and Emergency Medical Services ("Fire Department"). Plaintiff's duties included, inter alia, responding to structure and vehicle fires, performing rescue and emergency medical duties, attending training and educational sessions, and making himself available for fire protection coverage on a standby basis.

6. Plaintiff brought to his work for the Village his education and training in firefighting tactics and apparatus. During his years with the Fire Department, plaintiff regularly applied his training to do research, design apparatus, formulate standard operating procedures, anad analyze and critique tactical procedures. He did this by means of memoranda, reports, and oral communication. The Fire Department and the Village acknowledged these activities as contributions to the Fire Department and the Village.

7. Plaintiff continued in his long-standing role as a supportive and constructively critical member of the Department when on June 25, 1984 the Fire Department issued an order revising a Fire Department procedure for handling vehicle fires. Plaintiff, who had researched and formulated the procedure now to be changed, attempted to discuss the change with Frank Benak. When Benak would not do so, plaintiff spoke to his immediate supervisor, Lt. Ken Nelson. With Nelson's advice, plaintiff sent a memorandum dated July 2, 1984 to Nelson, Lt. Frank Zimmerman, Lt. George Benak, and Lt. Larry McCarty, in accordance with Part 1-3-1 of the Fire Department's rules and

Section 11.1 "Grievances" of the Village personnel manual ("Manual"). The rules and the manual were previously submitted as plaintiff's Exhibits A-2 and A-1, respectively, and are incorporated in this paragraph by reference.

8. The Village was required by the Village Personnel Policy Manual to allow plaintiff to submit memoranda expressing concern with proposed departmental actions. Chapter 11.1 provides:

> 11.1 Grievances
>
> 1.1 It is the policy of the Village Administration to encourage employees to discuss with their supervisors or Department Heads any problemsthey may have so that grievances may be cleared up. If an employee has any complaint or grievance concerning classification, working conditions, salary or other matters relative to employment, the employee should act as follows:
>
> 1. The employee should first discuss the problem with his immediate supervisor.
> 2. If the supervisor cannot offer a solution satisfactory to the employee, an appointment should be made with the Department Head to to discuss the problem.
> 3. If the conference with the Department Head still does not give the employee satisfaction, the Department Head, upon request of the employee, shall send a memorandum to the Village Manager wherein the employee's grievances and the action to be taken to date are set forth.
>
> 1.2 The employee has the right to appeal directly to the Village Manager. At the discretion of the Village Manager, the appropriate supervisor and Department Head may be contacted in order to explore all facts of the case. The Village Manager will then make a decision which will be final and the employee so notified in writing. A copy of this notification will be inserted in the employee's personnel file..

9. The Village responded to plaintiff's comment on the proposed changes with Benak's letter dated July 3, 1984 requesting plaintiff's resignation. Exhibit F-1, previously submitted to resign and incorporated in this paragraph by reference.

Plaintiff refused and indicated his desire to defend himself against attempts at "suppression of rights of free and responsible speech." Exhibit F-2, previously submitted and incorporated in this paragraph by reference. In a letter dated July 5, 1984, Benak notified plaintiff that he was discharged. The grounds for this action were Personnel Manual Ch.9, Section 9.1.11, and Fire Depart. Rules and Regulations 1-5-3. Exhibit F-3, previously submitted, incorporated in this paragraph by reference. Section 9.1.11 provide that it is grounds for dismissal that "the employee is antagonistic in attitude toward his superior officers or other employees, criticizing orders or policies issued and policies adopted by superiors or so acts as to interfere with proper cooperation of employees of the Village to the detriment of efficient public service" (emphasis supplied). Part 1-5-3 of the Fire Department Rules provides that an employee shall be subject to discipline if "the employee has been abusive in attitude, conduct and language in public, or toward the public, Village officials or employees...."

10. After an administrative hearing pursuant to plaintiff's July 5, 1984 request in accordance with the Personnel Manual, Village Manager Paul Nicholson issued findings and conclusions dated August 16, 1984 reducing plaintiff's termination to a 30-day suspension without pay. Nicholson found that plaintiff was required to conform his conduct to Benak's August 17, 1984 memorandum to Nicholson, providing, in pertinent part, that if plaintiff "wishes to discuss or question departmental rules or regulations, or lawfully issued orders on policies [plaintiff] shall requent an appointment with either the Assistant Chief or Chief of the department to discuss the matter." Exhibit H-1 and H-2, previously submitted, incorporated in this paragraph by reference.

11. In December of 1984, being aware of Benak's August 17 memorandum, plaintiff requested permission of Assistant Chief Ian Seivwright to submit a memorandum discussing his concerns about a proposed revision to the department's structure fire response policy. Plaintiff submitted his memorandum, dated January 7, 1985, to Seivwright. Exhibit K-3, previously

submitted, incorporated in this paragraph by reference. The plaintiff's January 7 memorandum set forth his concerns, recapitulated the history of the Village's purchase of the fire truck in question, and set out an alternative to the proposed change.

12. As a direct consequence of plaintiff's January 7, 1985 memorandum, Benak sent plaintiff a notice of termination dated January 31, 1985. The notice of termination referred to a violation of the August 17 directive and personnel manual rules as grounds for the termination: "you were requested to refrain from actions which criticized orders or policies of supervisors...." Exhibit M-1, previously submitted, incoporated in this paragraph by reference.

13. The Village's Personnel Manual provides that the Village must have just cause to discharge employee such as plaintiff. Plaintiff therefore had a vested property right to continued employment in the Village.

14. On February 2, 1985 plaintiff appealed the termination to Paul Nicholson. Exhibit N-1, previously submitted, incorporated in this paragraph by reference. In his letter dated February 5, 1985, Nicholson made findings of fact regarding the plaintiff's January 7, 1985 memorandum. He did so without the hearing plaintiff requested, in consultation with the Village attorney and the President and Board of Trustees, and upon review solely of plaintiff's memorandum and and his previous disciplinary file, without consideration of plaintiff's interest in commenting on matters of public concern. Exhibit O-1, previously submitted, incorporated in this paragraph by reference.

15. The Village discharged plaintiff without just cause.

16. Nicholson and the Village were required by the Village Personnel Policy Manual to hold the hearing they refused plaintiff. Chapter 11.2, section 2.1(2) of the manual provides:

> On request of the employee the Village Manager shall conduct a hearing into all the circumstances surrounding the complaint or appeal and make a decision in the matter.... (emphasis supplied)

17. The plaintiff attempted to comment on departmental policies with direct impact on the public welfare and of common

concern to all residents as well as firefighters. The Village's wilfull and malicious campaign to silence this comment, resulting in plaintiff's termination, impermissibly restricts plaintiff's restricts plaintiff's freedom of speech, guaranteed him by the First and Fourteenth Amendments to the United States Constitution, by conditioning plaintiff's continued public employment and use of the Village's grievance procedure on the non-exercise of this right.

18. The deprivations set out in paragraph 17, taken under color of state action, are a violation of the Civil Rights Act of 1871, 42 U.S.C. §1983, and entitle plaintiff to compensation and punitive damages, injunctive relief, and attorneys' fees.

WHEREFORE, plaintiff prays for relief as follows:

1. An injunction enjoining the Village to reinstate plaintiff to his former position;

2. Compensatory damages in the amount of $7,000.00;

3. Punitive damages in the amount of $50,000.00;

4. Plaintiff's costs and attorneys' fees in prosecuting this suit; and

5. Such other and further relief as this Court deems just and proper.

COUNT II

1.-18. Plaintiff realleges paragraphs 1-18 of his Count I as paragraphs 1-18 of Count II as if fully set forth herein.

19. The Village's wilfull and malicious refusal to grant plainitff the opportunity of a hearing concerning his termination deprives him of his property interest in his continued public employment without the process due him pursuant to the Personnel Manual and the Fifth and Fourteenth Amendments of the United States Constitution.

20. The deprivations set out in paragraph 16 (the refusal to hold a hearing required by Village personnel rules), taken under color of state action, are a violation of the Civil Rights Act of 1871, 42 U.S.C. §1983, and entitle plaintiff to compensation and punitive damages, injunctive relief, and attorneys' fees.

WHEREFORE, plaintiff prays for relief as follows:

1. An injunction enjoining the Village to reinstate plaintiff to his former position;
2. Compensatory damages in the amount of $7,000.00;
3. Punitive damages in the amount of $50,000.00;
4. Plaintiff's costs and attorneys' fees in this action; and
5. Such other and further relief as this Court deems just and proper.

DESPRES, SCHWARTZ & GEOGHEGAN

by_____
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(312) 372-2511

VERIFICATION

I, John E. Norton, first being duly sworn on oath, depose and state that I am the plaintintiff in the above Fourth Amended Complaint for Damages and Injunctive Relief, that I have read this complaint, and that the statements contained in it are true.

_____
John E. Norton

Subscribed and sworn to before me
this ____day of _____, 1987.

_____
Notary Public

(2)

No. 89-1693

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN E. NORTON,

Petitioner,

v.

PAUL C. NICHOLSON, FRANK G. BENAK,
LOIS J. FLEMING, and
THE VILLAGE OF WESTERN SPRINGS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

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NO. 89-1693

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOHN E. NORTON, Petitioner, v. PAUL C. NICHOLSON, FRANK G. BENAK, LOIS J. FLEMING, and THE VILLAGE OF WESTERN SPRINGS, Respondents.	)	Petition for Writ of Certiorari to the Illinois Appellate Court No. 87-1477

RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

A. Preliminary Statement

Petitioner, John E. Norton, in his petition for a writ of certiorari, includes a statement containing what he contends to be the material facts of the present case. United States Supreme Court Rule 15.1 obligates respondents to point out any perceived misstatements of fact made by the petitioner. Mr. Norton's statement of the case goes well beyond what is contained in the record. Respondents take issue with the argumentative and conclusory manner in which he characterizes the facts, as well as his frequent failure to cite to the record in support of his factual interpretations. Rather than attempting the cumbersome task of detailing each of the petitioner's misstatements of fact, however, respondents provide their own statement of the material facts.

B. Statement of Facts

Petitioner filed his initial complaint against the Village of Western Springs' Village Manager, its Fire Chief and its Director of Personnel on September 18, 1984. (R.2-5.) The complaint stated that Mr. Norton was a part-time fireman in Western Springs who prepared a July 2, 1984, memorandum addressed to the Western Springs Fire Department "Chain of Command." The memorandum, which Mr. Norton distributed to four lieutenants in the Department, criticized a change in fire fighting procedure and noted that Mr. Norton had attempted to bring the subject to the Fire Chief's attention. Mr. Norton's memorandum, the text of which is reprinted in full on pages 8-10 of his petition, ended by stating:

> I tried to clarify some of this with the Fire Chief, but he 'made a face' and walked away from me without a word. I can only guess that he couldn't answer

> unless it went through the 'chain of command.'

The complaint stated that, as a result of his having written the memorandum, Mr. Norton was fired. (R.2-6.)

Under the Village's appeal procedure, Mr. Norton sought and was given a hearing. (R.409-411.) At the hearing, he submitted both oral presentations and written documents. One of the documents, a memorandum written by Mr. Norton and dated July 26, 1984, related to past discussions with the Fire Chief on procedural and operational matters. That memorandum, which outlined more than 20 previous "verbal criticisms" of the Fire Chief, stated that Mr. Norton's criticisms had gone on for two years. Moreover, the memo indicated that in some of the cited instances, "raised voices and harsh words were generated by both of us and witnessed by others." (App., pp. 6a-7a.)

After the hearing and a review of the

written documentation submitted by Mr. Norton, the Village Manager reduced the discipline from termination to suspension without pay for 30 days. (R.409-411.) The Village Manager's findings, set forth in a three-page letter dated August 16, 1984, cited the reasons for Norton's termination and stated that the memorandum constituted a violation of the Village Personnel Manual and the Fire Department Rules and Regulations. (R. 409-411.)

Before the defendants filed a pleading in response to the administrative review complaint, Mr. Norton wrote a second memo, dated January 7, 1985, addressed to the Assistant Fire Chief, which criticized a proposed change in the use of some recently purchased equipment. (R.428-430.) The memo stated that the proposed change was from an earlier policy agreed on between plaintiff, the defendant Fire Chief and the Assistant Fire Chief.

Mr. Norton claimed, in the memo, that the change from the agreed-on policy was wrong, writing that "I guess I was just totally 'suckered' into an insincere ploy and became a party to deceitful communication." He also wrote that one way of looking at the proposed change is that:

> Either - All three of us on the committee were really stupid, ill-advised and naive;
>
> or
>
> We are guilty of willful deceit and connivance;
>
> or
>
> Someone has an extremely short memory.

(R.429.)

On January 31, 1985, the defendant Fire Chief wrote Mr. Norton a letter terminating his position as a part-time firefighter. (R.436.) Plaintiff requested an appeal (R.438) which resulted in the Village Manager reviewing the facts

and making a finding that the termination was justified because the antagonistic tone of the memorandum violated the Village Personnel Code. (R.440-441.)

After his dismissal, Mr. Norton amended his complaint to seek review of the firing as well as review of the earlier discipline occasioned by the original memorandum. (R.15-24.) The amended complaint was stricken by the trial judge (R.37), as was the subsequently filed second amended complaint (R.65), and the case was dismissed. (R.73.) The court, however, later vacated the dismissal and allowed Mr. Norton to file his eight-count, three-volume third amended complaint. (R.457.) That too was dismissed, pursuant to the defendants' motion, and the trial court denied Mr. Norton leave to file a fourth amended complaint. (R.663.)

The Illinois Appellate Court, First District, found that the appropriate

method of review of municipal administrative agency decisions is by way of a common law writ of certiorari because such cases do not fall under the ambit of the Illinois Administrative Review Act (Ill. Rev. Stat. ch. 110, ¶¶ 3-101 et. seq. (1987)). Thus, the appellate court treated the case as though the trial court had granted certiorari and reviewed the lengthy record. In its opinion (Norton v. Nicholson, 187 Ill. App. 3d 1046, 543 N.E.2d 1053 (1st Dist. 1989)), the court concluded that the discipline imposed by the Village in response to both of Mr. Norton's memoranda was supported by the evidence. (App., pp. 1a-17a.) It proceeded to review the third and proposed fourth amended complaints to determine if plaintiff had stated a cause of action for damages based on violations of his rights to free speech, in writing and circulating the memoranda, and due process in the way

in which the discipline was effected. It concluded that plaintiff failed to assert a claim. (App., pp. 12a-17a.)

On November 1, 1989, Mr. Norton filed a petition for leave to appeal to the Supreme Court of Illinois. On January 31, 1990, his petition was denied.

II. SUMMARY OF ARGUMENT

Mr. Norton claims that he was disciplined and ultimately fired for having written two memoranda which were distributed to his superiors within the Western Springs Fire Department. The essence of his claim is that the subject matter of his memoranda touched upon a matter of public concern, and that the sanctions imposed upon him by the Village constituted violations of his right to free speech. The Illinois Appellate Court, however, properly viewed the suspension and firing as appropriate

discipline imposed upon a disruptive employee whose speech was, at best, of very limited First Amendment interest.

Mr. Norton now asks this Court to grant his writ of certiorari, claiming first, that the Court is obligated to review this case because it involves free speech issues, and second, that the appellate court's decision is in conflict with certain principles of law enunciated by the Supreme Court and other federal appellate courts. As to his first point, respondents submit that the mere fact that a free speech claim has been asserted does not, without more, present the type of "special and important" reason required by this Court's rules for granting certiorari. With regard to Mr. Norton's second contention, respondents submit that the appellate court's opinion aptly demonstrates that the proper principles were in fact applied, and that the

decision is in harmony with federal case law.

In cases, like the present one, involving free speech claims by public employees, two tests should be applied by reviewing courts. The first test involves an examination of the content, form and context of the employee's speech in order to determine whether the speech addresses an issue of "public concern." The second test involves an examination of numerous factors, including the time, place and manner of the speech, in an effort to "balance" the employer's interest in providing efficient public services against the employee's interest in protected speech. The Illinois Appellate Court, after engaging itself in a lengthy analysis of the record facts, applied both of these tests and affirmed the discipline imposed against the petitioner.

The appellate court first concluded that Mr. Norton's memoranda were more

accurately characterized as merely employee grievances over internal operations, rather than matters of public concern. This was because the memos had been written in the context of a two-year history of carping criticisms directed at the Fire Chief by petitioner, and the topic of each memo, like Norton's previous criticisms, involved nothing more than complaints about internal fire department procedures. Secondly, the appellate court determined that the sarcastic and pointed nature of the petitioner's criticisms of the Fire Chief, combined with the need for close working relationships among co-workers in this small suburban fire department, tipped the balance in favor of the Village's interest in providing efficient public services.

The Illinois Appellate Court thus applied the appropriate tests to the facts of Mr. Norton's case and reasonably

concluded that he failed to state a claim for violation of his right to free speech. Review by this Court is therefore not warranted.

III. ARGUMENT

Mr. Norton essentially states two reasons for granting certiorari in this case. First, he argues that this Court has an obligation to grant certiorari in cases involving free speech claims by public employees. Second, he contends that the lower court's decision is in conflict with decisions by this Court and other federal courts of appeals.

A. Certiorari Review By This Court Is Not Warranted Simply Because A Free Speech Claim Has Been Made.

Mr. Norton begins his argument by claiming that this Court has an obligation to conduct a certiorari review in

virtually all public employee free speech cases in order to continue to stress and clarify the standards to be used by lower courts in reviewing such cases. (Pet. for Cert., pp. 17-19.) Mr. Norton contends that the present case should be reviewed by this Court, if for no other reason, so that other courts may again be guided, cautioned and admonished regarding the rights of free speech by public employees. While respondents appreciate the importance of constitutional rights such as free speech, it is respectfully submitted that this Court could not conceivably act as a reviewing body for every imaginable set of litigated circumstances simply because a free speech issue is presented. Absent some special and important reasons for granting Mr. Norton's petition, this Court should not do so. (Sup. Ct. R. 10.1.) The petition presents no such reasons.

B. The Illinois Appellate Court's Decision Is Consistent With Relevant Decisions Of This Court And Other Federal Appellate Courts.

Petitioner also claims that certiorari should be granted because the Illinois Appellate Court supposedly decided the issues in this case in a manner which conflicts with applicable decisions of this Court and other federal courts of appeals. (Pet. for Cert., pp. 19-31.) Mr. Norton does not, however, cite any decisions in direct conflict with the Illinois Appellate Court's opinion. Instead he attempts to demonstrate a more general failure by the court to faithfully adhere to the principles enunciated by federal appellate courts in the context of free speech claims by public employees. The remainder of this argument will be devoted to discussing this contention.

1. The Applicable Standards And Tests

Mr. Norton cites Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986), for the proposition that courts reviewing First Amendment claims by public employees must apply three specific tests to the facts of such cases. The Ferrara case involved a teacher's claim that he had been terminated for speaking out against the practice of allowing high school students to select their own classes. The court determined that Ferrara's speech did not involve a matter of public concern, but rather a matter of internal school policy. Ferrara, 781 F.2d at 1516.

The steps required by Ferrara, according to petitioner, include: (1) an analysis as to whether the public employee's speech addresses an issue of "public concern," as defined in Connick v. Meyers, 461 U.S. 138, 103 S. Ct. 1684 (1983); (2) a determination as to whether

the employee's speech was the "prime motivating factor" in the imposition of discipline, as explained in Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568 (1977); and, (3) a balancing of the employer's interest in providing efficient public services against the employee's interest in protected speech, as provided by Pickering v. Board of Ed. of Township High School Dist. 205, 391 U.S. 563, 88 S. Ct. 1731 (1968). If any one of the foregoing tests results in a finding adverse to the employee, his case must fail.

The second step, referred to by petitioner as the "Mt. Healthy" test, is not relevant to this proceeding. Whether an employee's speech was the prime motivating factor of his discipline involves questions of fact (Hall v. Ford, 856 F.2d 255, 258 (D.C. Cir. 1988)), and factual questions cannot properly be

disposed of upon a motion to dismiss. Peterson v. Yacktman, 25 Ill. App. 2d 208, 213, 166 N.E.2d 452, 455 (1st Dist. 1960); Fancil v. Q.S.E. Foods, Inc., 60 Ill. 2d 552, 554, 328 N.E.2d 538, 539 (1975). Since Mr. Norton alleged in his complaints that his memoranda were the cause of his discipline, the defendants were deemed to have admitted that fact for purposes of their motion to strike and dismiss. Thus, the Illinois Appellate Court properly declined to address that issue.

The first and third of the tests enumerated above, however, involve questions of law for the court to resolve. Hall, 856 F.2d at 258. Respondents thus agree that the so-called "public concern" inquiry set forth in Connick, and the "balancing test" set forth in Pickering, were properly before the appellate court in this case. Indeed, the Illinois Appellate Court applied each

of these tests to the facts of the present case and determined that Mr. Norton's memoranda were, at best, of only limited public concern, and that the Pickering balance tipped in favor of the Village's interest in providing efficient public services.

It is thus clear that the true nature of petitioner's dispute here is not whether the proper tests were applied, but whether they were properly applied to the facts of this case. The following discussion of the "public concern" inquiry and the "balancing" test supports the appellate court's opinion and demonstrates that the decision is in harmony with the relevant decisions by this Court and other federal courts of appeal.

a. The "Public Concern" Test

It is well-settled that a public employee does not give up his freedom of speech in return for a job. On the other

hand, when a public employee's expression cannot be fairly considered as relating to a matter of political, social or other public concern, his dismissal is usually not subject to judicial review, even if the reasons for the dismissal are alleged to be mistaken or unreasonable. Connick, 461 U.S. at 146.

Governmental employers have broad discretion in dealing with their employees' expressions of opinion on matters that affect only the internal workings of the agency. "[T]he First Amendment does not require a public office to be run as a round table for employee complaints over internal office affairs." 461 U.S. at 149. The employer need not "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." 461 U.S. at 152.

The question of whether an employee's speech addresses a matter of public concern should be determined by examining the content, form and context of a given statement, as revealed by the entire record. 461 U.S. at 136-137. The appellate court carefully examined the lengthy multi-volume record and devoted nine pages of its opinion to a detailed discussion of the facts. (App., pp. 4a-12a.) The content, form and context of Norton's speech clearly weighed heavily in the court's decision.

The context of petitioner's speech, for instance, was of special concern to the court. (App., pp. 15a-16a.) The court noted that the subject memoranda were written in the context of a two-year history of vocalized criticisms of the Fire Chief by Mr. Norton. By Norton's own admission, the past criticisms involved "raised voices and harsh words" between

the Fire Chief and Mr. Norton in the presence of others. Mr. Norton himself provided the Village Manager with a memorandum containing a veritable laundry list of past criticisms which he had personally communicated to the Fire Chief. (R.404-405.) That the petitioner's two memoranda were written in the context of a multitude of similar complaints and criticisms emphasizes the fact that the content of his speech is, as the court held, more accurately characterized as "merely employee grievances concerning internal operations." (App., p. 16a.)

The form of Mr. Norton's memoranda further emphasizes the internal nature of the speech. Mr. Norton admittedly followed the "grievance and complaint" procedure in routing his private memoranda through the Department "Chain of Command." The fact the petitioner chose a

private forum, rather than a public one, does not automatically remove his case from the umbrage of the First Amendment. Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 99 S. Ct. 693 (1979) (employee's speech concerning issues of desegregation and racial discrimination, which were obviously matters of great public concern, was protected even though the employee used a private forum). It does, however, indicate that Mr. Norton himself apparently believed that his speech involved an employee grievance.

Finally, the appellate court clearly felt that the content of Mr. Norton's memos was unworthy of being designated a matter of public concern. The memoranda contained sarcastic criticisms of specific changes by the Chief in the use of the Department's fire fighting equipment. Mr. Norton urges the Court to view his memoranda as involving matters of public

concern because they deal with the "comparative capabilities" and "response order of particular fire apparatus" which could reasonably be assumed to be of "benefit of the community." (Pet. for Cert., p. 23.) Despite Mr. Norton's efforts to aggrandize the topic of his speech by equating his memos with "whistleblowing activity," the bottom line is that his comments were merely two more in a long series of private criticisms of policies that affected the internal operations of the fire department. Consequently, the speech is, at best, of very limited First Amendment interest.

Mr. Norton argues that Bickel v. Burkhart, 632 F.2d 1251 (5th Cir. 1980) is a case on point and that it demonstrates that Norton's memos were of public import. The only similarity between Bickel and the present case, however, is the fact that both cases involved

communications between a fireman and a fire chief. Bickel's remarks, unlike Norton's, were not aimed at anyone, directly or indirectly; rather, his criticisms generally concerned the fire department as an institution and were not detailed criticisms of internal operational policies. Moreoever, the content of Bickel's speech was significantly different than Norton's. Bickel's speech was an isolated incident, and his comments were made at an open meeting in which a frank discussion was held for the purpose of airing grievances about the pay scale for firemen. The firemen, including Bickel, were already upset about not having received a salary increase, and complaints and criticisms at the meeting were expected. Bickel, 632 F.2d 1256-57.

The Bickel decision, like the remainder of the cases cited by

petitioner, is factually distinguishable from, and completely consistent with, the decision in the present case. In fact, the Bickel court, like the Illinois Appellate Court, stressed the critical need for operational efficiency and harmony among co-workers in the "high stakes" profession of fire fighting. Bickel, 632 F.2d at 1257.

Mr. Norton's choice of Ferrara as the model case is also telling. In denying relief to Mr. Ferrara, the court noted:

> We . . . do not doubt Ferrara's sincere interest in and commitment to quality public education. We hold merely that a public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run.

Ferrara, 781 F.2d at 1516. Similarly, respondents do not doubt Mr. Norton's commitment to quality fire protection. Respondents suggest, however, that he

should not be allowed to transform his personal grievances into matters of public concern by invoking a supposed popular interest in the way the fire department is run.

b. The "Balancing" Test

Pickering made clear that the task of courts confronted by cases like the present one is to seek a balance between the freedom of the employee, as a citizen, in commenting upon matters which conceivably could be of public concern and the interest of the municipality, as an employer, in promoting the efficiency of the public services it performs. Pickering, 391 U.S. at 568. In Germann v. City of Kansas City, 776 F.2d 761 (8th Cir. 1985), cert. denied, 479 U.S. 813, the court described the Pickering analysis as follows:

> In applying the Pickering balance, courts should

> consider the following factors: (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and coworkers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.

Germann, 776 F.2d at 764.

The Germann case is evidence that other courts nave not hesitated to affirm discipline applied against public employees who confront their superiors even in the face of First Amendment claims by the employees. In Germann, a Kansas City fireman had written a critical letter to the Fire Chief in which he claimed that the Fire Chief had a "pitifully twisted outlook toward the employees of the Department." The court of appeals held

that the district court properly ruled against the fireman's claim that the Fire Chief's subsequent failure to promote him violated his First Amendment rights. The court noted that after receipt of the letter, the Chief "understandably felt personally insulted and reasonably questioned Appellant's loyalty and respect for him as Fire Chief and whether Appellant would promote and implement department policy." Germann, 776 F.2d at 764-65.

Likewise, even if Mr. Norton's speech touched upon a matter of public concern, his claim that the third amended complaint stated a section 1983 claim for violation of his First Amendment rights was properly rejected. First, the criticism in the July 2, 1984, memo was directed solely at the Fire Chief. In a small suburban fire department like Western Springs, it is apparent that Mr. Norton would have to

work closely with the Fire Chief. His sarcastic remark would certainly make cooperation difficult or impossible. Mr. Norton's reasons for enclosing the phrase "Chain of Command" in quotation marks and including the final sentence ("I can only guess that he couldn't answer unless it went through the 'Chain of Command'") were clearly to call attention to Mr. Norton's sarcastic criticism of his superior officer, to embarrass the Chief, and to undermine his authority. No other possible reason could exist for directing a remark to the Department's officer corps regarding the Fire Chief's ability to respond to criticism.

The January 7, 1985, memorandum was even more outrageous. Mr. Norton accused the two top officers in the Department of "suckering" him into an "insincere ploy" and making him a party to a "deceitful" communication. He suggested that his

superior officers were naive, stupid or ill-advised. These charges are obviously highly disruptive of the Department's morale and ability to operate efficiently.

Significantly, a "fire department, like a police department, has a greater than normal government interest in maintaining morale and discipline." Hughes v. Whitmer, 714 F.2d 1407, 1419 (8th Cir. 1983), cert. denied, 465 U.S. 1023. As the Illinois Appellate Court correctly stated, even if some limited public interest is involved here, this "does not require that the municipality tolerate action which it reasonably believed would disrupt its operations, undermine the authority of its Fire Chief and destroy working relationships within the Department." (App., p. 16a.)

Despite petitioner's claim that the Pickering analysis is solely a question of fact (Pet. for Cert., p. 29), the

established caselaw provides for the resolution of these questions by the court, as a matter of law. Hall, 856. F.2d at 261. In balancing the employer's interests against those of the employee, the court must obviously review the factual record and make its decision therefrom.

Although the reviewing court cannot engage in "unadorned speculation" in determining the impact of speech upon a government agency's ability to function efficiently, nothing under Connick or Pickering forbids the court from drawing reasonable inferences of harm from the employee's speech, his position and his working relationship with his superiors. Hall, 856 F.2d at 261. Connick provides that the employer need not allow events to unfold to the extent that the office is disrupted and working relationships are destroyed before taking action. Connick,

461 U.S. at 152. "Just as the employer may be permitted to infer these untoward consequences from the content, manner, time and place of the employee's speech, so may [the reviewing court]." Hall, 856 F.2d at 261.

IV. CONCLUSION

Mr. Norton fails to demonstrate that the Illinois Appellate Court's opinion is in conflict with a decision of this Court or any other federal court of appeals. Neither does his petition present any other special and important reasons for granting his writ.

For the foregoing reasons, respondents request that Mr. Norton's petition for writ of certiorari to the Illinois Appellate Court be denied.

Dated: May 29, 1990

Respectfully submitted,

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No. 89 - 1693

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

John E. Norton,
Petitioner

v.

Paul C. Nicholson, Frank G. Benak,
Lois J. Fleming, and The
Village of Western Springs,
Respondents

On Petition For a Writ of Certiorari
to the Illinois Appellate Court

Petitioner's Reply Memorandum

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INTRODUCTION

Pursuant to S.Ct. Rule 15.6, the following memorandum addresses arguments first raised by the respondents in their May 29, 1990 Opposing Brief in No. 89-1693.

Additionally, petitioner wishes to correct a numerical reference error on page 3 of his petition, under the heading of HOW THE FEDERAL QUESTIONS WERE RAISED. The third sentence therein contains a mistaken reference to 28 U.S.C. §1983. This should be changed to read 42 U.S.C §1983.

ARGUMENT

In their Opposing Brief (on p. 1), the respondents claim outright that the petitioner misstates the facts of this case, going well beyond what is contained in the the record. And yet the respondents do not substantiate their claim with specific references of error. While it is impossible to respond definitively to an unspecified allegation of misstatement, the petitioner can and does emphatically state that this Court will find that the facts articulated on pages 4-17 of his petition were contained within the following portions of the record:

> The petitioner's Third Amended Complaint (and restated in his proposed Fourth Amended Complaint) as filed in the Circuit Court of Cook County, Illinois (pp. 45a-62a and 62a-69a respectively of the appendix attached to the Petition).
>
> The three volumes of exhibits attached to the Third Amended Complaint and proposed Fourth Amended Complaint [**R.C.117-456**].
>
> The Illinois Appellate Court's ruling as reported at 187 Ill.App.3d 1046, 543 N.E. 1053 (pp. 1a-17a of the appendix attached to the Petition).

The facts averred in this case are those alleged in the petitioner's Third Amended Complaint and its attached exhibits. The respondents, in their motion to dismiss that Third Amended Complaint, under section 2-615 of the Illinois Code of Civil Procedure, admitted those facts to be true as alleged. Furthermore, the petitioner's statement of the facts in his petition were substantially the same as recounted to both the Illinois Appellate Court and the Illinois Supreme Court, and the respondents never once objected to the petitioner's statement of the facts. To do so now, for the first time,before this high Court, without specificity is not only unfounded, but also highly inappropriate.

The petitioner stands on his statement of the facts. The truncated version by the respondents, in their opposing brief, omits many of the pertinent facts alleged in the Third Amended Complaint; but in particular the following three significant facts need to be reinserted and re-emphasized:

1) That the respondents specified in writing that the petitioner could discuss or question fire department policies, provided he did so through either the Fire Chief or the Assistant Fire Chief (item #4 of **R.C. 412**, reprinted on p.32**a** of the appendix attached to the petition)—as alleged in ¶4 of Count V of petitioner's Third Amended Complaint (p. 56**a** in the appendix of the petition).

2) That the petitioner requested advice and permission from the Assistant Chief, and received his prior approval to submit a critical memorandum in January 1985 (**R.C. 427**)—as alleged in ¶¶ 3-5 of Count V of petitioner's Third Amended Complaint (pp. 55**a**-56**a** in the appendix of the petition).

That the Village Manager denied the petitioner's written request for an appeal hearing, after his termination in February 1985 (**R.C. 440-441**), despite the Village Personnel Manual's stipulation that such a denial is not discretionary (**R.C. 150-151**)—as alleged in ¶¶ 6-8 of Count V of petitioner's Third Amended Complaint

(pp. 56a-57a in the appendix of the petition).

Additionally, the respondents raise new issues with the truncation and misstatement of cases they cite in the argument section of their opposing brief.

On pages 20-23 of the argument section of their opposing brief, the respondents insist that the context of prior criticisms by petitioner demonstrates that his memoranda of July 1984 and January 1985 were of a personal nature and not protected speech on matters of public. However, as *Monsanto v. Quinn* (674 F.2d 990, 3rd Cir. 1982, at 999) emphatically states, speech does not lose its protection merely because it was persistent. *Arguendo,* nor is it stripped of its first amendment protection because it "irritates" or "harasses" (*Peacock v. Duval*,694 F.2d 644, 9th Cir. 1982, at 647). Furthermore, the content of those prior criticisms (*eg.* safety concerns, equipment and tactical deficits, conformance with State regulations, etc.—see **R.C. 404-405**) deal with issues of public concern and not private grievances that affected the petitioner. Finally, all of these criticisms were either specifically requested of petitioner by Chief Benak or given within context of a typical Monday night postdrill group session "open" to "frank discussion" from anyone on the department (analogous to "open meeting" of *Bickel v. Burkhart*, 632 F.2d 1251, 5th Cir. 1980, cited by the respondents on pp. 23-24 of their brief).

On pages 26-27 of their brief, the respondents cite *Germann v. City of Kansas City* (776 F.2d 761, 8th Cir. 1983) as pertinent to the application of the *Pickering* "balancing test" to the case at bar. However, the facts in that case are totally distinguishable as indicated by the following:

> The employee in *Germann* was an officer (Captain), relatively high in the chain of command.
>
> The letter he wrote consisted of no substance other than personal attacks on the Fire Chief and was mailed to city officials as well as fire department officials.

> There was no actual discipline of either suspension or dismissal, but rather a discretionary matter of non-promotion to a higher management position in the department as an assistant to and directly below the Fire Chief.

The major rationale in the *Germann* Court's decision was:

> Here..., because close supervision of a battalion chief by the fire chief was impossible, personal loyalty to the chief was critical to the management structure of the fire department.... 'Cohesive operation of management is dependent on the loyalty of inferior management.' (at 765)

Likewise, the truncated "interest in maintaining morale and discipline" cited by the respondents from *Hughes v. Whitmen* (714 F.2d 1407, 8th Cir. 1983) was held by that court to be an "impartial" and "nonpunitive" transfer of a police officer in order to resolve an actual ongoing morale problem involving actual disruption and disharmony within an entire division of the police force, and not related to the individual's exercise of free speech (at 1420-14521, emphasis added). This holding is hardly relevant to the punitive suspension and termination of the petitioner for his memoranda to his superiors—in the case at bar--which resulted in no demonstrated morale problem, no disruption or disharmony within the Western Springs Fire Department.

The respondents similarly truncate the findings in *Hall v. Ford* (856 F.2d 255, D.C. Cir. 1988) on pages 31-32 of their brief. The *Hall* court carefully stipulated that "reasonable inferences of harm from the employee's speech" rather than requiring "objective evidence of concrete harm" are allowable when the applying the Pickering balance in cases involving "high-level Policymakers," as compared to the more stringent burden of proof with low-level, nonpolicymaking employees (at 261, citing *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, at 2900). This is far removed from the situation in the case at bar where the petitioner was a fire fighter at the very bottom of the 5-level chain of command in a nonmanagement role, with his criticisms leveled at the Fire Chief and Assistant Chief at the very administrative top of that chain--which

"should be followed in all cases" (See diagram of chain of command structure from section 1-3-1 of Western Springs Fire Dept. Rules & Regulations, reprinted on p. 42a of appendix in petition).

It is factually significant that the petitioner was separated from the Chief and Assistant Chief by the chain of command (pursuant to *Wulf v. City of Wichita*, 883 F.2d 842, 10th Cir. 1989, at 861). The petitioner's criticisms did not impact his immediate supervisors (lieutenants) nor his coworkers (other fire fighters), as specified in *Pickering* (391 U.S 563, 88 S.Ct. 1731, at 1735-1737).[1] The respondents' contend (on pp. 28-29 of their brief) that there was a necessarily close relationship between petitioner as fire fighter and respondent Chef Benak as department head, since the agency is a small suburban fire department. This contention is contrary to fact (the fire department was and still is an average size suburban fire department in Illinois, with between 35 to 40 personnel and 6 pieces of apparatus, and has a strict 5-level chain of command structure)

As stressed in *Melton v. City of Oklahoma City* (879 F.2d 706. 10th Cir. 1989, at 715-716), "although we recognize the potential impact that [statements] may have on the department, we must point out that the government must introduce evidence of an actual disruption of its services resulting from the speech at issue" (citing *Rankin v. McPherson*, at 2899, emphasis added). The *Melton* Court went on further in a footnote (f.n.#11, at 716) to explain:

> ...[W]e are not creating a new rule nor are we increasing the quantum of proof which the government must carry. We merely recognize what we believe to be an obvious *Pickering* requirement that the government show some ascertainable damage to its functioning as a result of the challenged speech. In our view the government cannot prevail in a *Pickering* balance by merely relying on unsubstantiated allegations of disruption. (citations omitted,

[1] Respondents seem to equivocate "co-workers" and "superiors"; also "immediate supervisors" and "high-level superiors."

emphases in orginal)

Lastly, the respondents cite *Connick v. Meyers* (461 U.S. 138, 103 S.Ct. 168) as holding that employers "need not allow events to unfold to the extent that the office is disrupted and working relationships are destroyed before taking action" (pp. 31-32 of their brief). However, it must be noted that in *Connick* there was evidence of actual "events" of disruption in the agency caused by employee's distribution of the questionaire/survey aimed at her immediate supervisors in that case (*Connick*, at 1693). What "events" and/or what "working relationships" are the respondents referring to in the case at bar? What "events of disruption" and/or what "destruction of working relationships" were the respondents attempting to prevent?[2] To date they have not demonstrated any evidence or specific concerns applicable to the "*Pickering* test" that would tip the balance in favor of a governmental interest over that of a low-level employee's free speech rights—as citizen—to critically comment on the fire apparatus response policy of his department. "Even in a police department, the complained-of disruption must be real and not imagined" (*Thomas v. Carpenter*, 881 F.2d 828, 9th Cir. 1989, at 831).

In the same vein, the respondents again cite *Connick* as controlling (on p. 19 of their brief), to substantiate their view that an employer doesn't have to provide "a round table for employee complaints." What the respondents fail to acknowledge is that they themselves provided the "round table" for petitioner's complaints" by stipulating in writing that his wishes to discuss and question departmental orders and policies could be taken up with either the Fire Chief or Assistant Fire (item #4 of Fire Chief's August 17, 1984 directive, R.C. 412, reprinted at 32a in appendix of petition). Furthermore, the content and

[2]At the time, the petitioner was on sabbatical leave from the department because of his "out of town" work on his doctoral residency requirements (he was home for Christmas vacation), and departed the Village a few days after he delivered his January 7, 1985 memorandum to Assiatnt Chief Seivwright, for continued downstate residential work at Illinois State University until May 1985.

form—as well as the time, place, and manner—of that discussion/questioning was given prior approval and encouragement by the Assistant Chief of the Department, who stated that he was open to any input on the specific proposed change in apparatus response policy, and likewise advised the petitioner that it would be proper procedure to write him a memo expressing critical concerns about the proposed change in policy.[3]

Therefore, *Givhan v. Western Line Consol. School Distr.* (439 U.S. 410, 99 S.Ct. 693) is controlling rather than *Connick*.[4] In *Givhan*,the employee—just as in the case at bar—received permission to communicate with her supervisor. This high Court held that when a supervisor "opens the door" to private communication from an employee, he is no longer in a position to argue that he was the "unwilling recipient" of the employee's views (at 696), even if "hostile, "loud," and "arrogant" (at 695). Thus the petitioner's communications in the case at bar could not be considered an "affront to [his] superiors," as contended by the Illinois Appellate Court (at 1061 of its decision, reprinted on p. 16a in appendix of petition), since the respondents repeatedly "opened the door" each time they gave permission when petitioner "knocked" and actually welcomed his "entry." Additionally, in each instance, the petitioner gave at least one week prior notice before "passing through the portal," which certainly gave respondents sufficient time to "bar entry" if they feared a potential for "disruptive events" or "threat to working relationships" to unfold. As stated in *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41, 2nd Cir. 1983, at 46), any potential disruption is minimized when an employee gives such advance notice of intention to communicate critical concerns and

[3] It is also significant that speech occurred in a "zone of privacy," where employee is not on duty or in uniform, not on the premises of the agency, and communicating privately to a fellow employee [Seivwright] considered to be a friend (*Waters v. Chaffin*, 684 F.2d 833, 11th Cir. 1982, at 837).

[4] *Givhan* was cited as distinguishable in *Connick v. Meyers* (461 U.S. 138, 103 S.Ct. 693, at 1691, f.n. 8).

receives permission to do so from his superior.

The petitioner concedes that none of the foregoing precludes the possibility that respondents may eventually prevail in demonstrating sufficient governmental interest in suppressing the petitioner's speech activity. However, the petitioner's contention is that limitation of speech rights of a governmental employee is a serious deprivation of liberty and can only be justified with the constitutional safeguards of due process of an evidentiary hearing. Such due process has been denied by the respondents' refusal to provide administrative post-termination appeal hearing to petitioner as well as by the Illinois Appellate Court's summary dismissal of petitioner's First Amendment claim without having a complete factual record to review. As held in *Porter v. Califano* (592 F.2d 770, 5th Cir. 1979, at 772), a summary dismissal of a First Amendment claim is inappropriate where there are genuine issues of fact. Furthermore,

> it is improper to rely heavily on the investigative findings and conclusions of an interested agency in a case such as this involving delicate and complex matters of an individual's constitutional right against the government, especially where, as here, agency fact-finding procedures were inadequate.[5] (also at 772)

A Court's use of summary judgment judicial review to "rubber stamp" a governmental agency's administrative findings "obscur[es] rights indelibly printed in the Constitution" (at 778). Thus it is necessary to hold a full evidentiary hearing to factually determine the extent, if any, to which employee's speech actually disrupted the governmental agency (at 777).

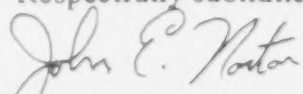
CONCLUSION

For the reasons set forth above, as well as those contained in

[5]Deemed inadequate where record is incomplete, no testimony of superiors is in the record, facts selectively recorded, vague and biased evidence, conflicting evidence, anonymous and inconclusive hearsay (*Porter*, at 777-778).

the original petition, a writ for certiorari should be granted to review the judgment and opinion of the Illinois Appellate Court. In light of the inability of the respondents to face the issues without ventilating all of the facts and distorting case law pertinent to this case, as well as the demonstrated conflict between the Illinois Appellate Court's findings and the holdings of this Court and Federal Appeals Courts, the petitioner respectfully suggests that the need for plenary review of this First Amendment claim should now be obvious.

Respectfully submitted,



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June 1st, 1990